

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF NEW YORK

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17-MC-1302 (PKC)

3 In Re:

United States Courthouse
Brooklyn, New York

4 Unsealing Motion/Motion

5 by the Government for

June 19, 2017
1:00 p.m.

6 courtroom closure

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9 TRANSCRIPT OF CRIMINAL CAUSE FOR UNSEALING MOTION
10 BEFORE THE HONORABLE PAMELA K. CHEN
11 UNITED STATES DISTRICT JUDGE
12 AS SPECIAL MASTER

11 APPEARANCES

12 For the Government:

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19 For interested
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25 (Continued following page.)

(Appearance continued.)

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1 (In open court.)

2 COURTROOM DEPUTY: All Rise.

3 THE COURT: Have a seat everyone.

4 COURTROOM DEPUTY: In re unsealing motion, motion by
5 the Government for courtroom closure, docket 17-MC-1302.

6 Will the parties state their appearances.

7 MR. NORRIS: For the Government, Evan Norris,
8 Temidayo Aganga-Williams, and with permission of the Court we
9 have an intern with us, David Steinbach; no parties have
10 objected.

11 THE COURT: Certainly. Welcome everyone. Good
12 afternoon.

13 MR. WOLF: Robert Wolf and Robert McFarlane
14 representing John Doe, also known as Felix.

15 THE COURT: Good afternoon to you.

16 MR. LANGFORD: Representing Richard Behar and Forbes
17 Media LLC. And co-counsel Jay Brown sends his apologies for
18 not being here on Thursday and today.

19 THE COURT: Who was the counsel?

20 MR. LANGFORD: John Brown.

21 THE COURT: Good afternoon Mr. Behar and also
22 Mr. Langford.

23 Good afternoon, Mr. Kaufman. And you are?

24 MR. HENRY: James Henry.

25 THE COURT: Okay.

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1 MR. LERNER: Richard Lerner for Richard Roe. And I
2 asked if I may dispense of the fiction and refer to the
3 parties by their real names.

4 THE COURT: Let's stick with the fiction for now. I
5 know that obviously it's been released in some form but
6 currently the caption reads -- I'll say the same to you,
7 Mr. Wolf -- John Doe and Richard Roe. Let's just preserve
8 that for purposes of today's hearing.

9 MR. WOLF: I'll say this, our apologies as well for
10 not appearing on Thursday before the Court. Our confusion
11 with the bifurcated order and everything got pushed to Monday,
12 today.

13 THE COURT: Understood, understood. The scheduling
14 was a little bit last minute, so I understand that you might
15 have been confused.

16 So we're here, as everyone knows, for a hearing on
17 the motion of the respondent appellant, Richard Roe, the
18 Intervenor, Richard Behar, and Forbes Media LLC, and the
19 Amicis of DCReport.org, WhoWhatWhy.org, and WiseLawNY to
20 unseal certain documents that have been filed in the Second
21 Circuit. Motions have been filed there, but all of those
22 motions are currently under seal as well.

23 As everybody knows, I've been appointed Special
24 Master by the Second Circuit panel that is hearing the motions
25 to make a report or give a report to the Second Circuit on

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1 these pending motions.

2 For today's hearing the parties moving for unsealing
3 will go first with their arguments. And because, as I said,
4 the motions themselves are still under seal I do not want any
5 party on either side to explicitly reference any argument or
6 factual assertion that is made in your currently pending
7 submission before the Circuit which is under seal. Now,
8 matters that are public record or even arguments obviously
9 that could be contained in those filings can certainly be
10 referenced or made here or repeated today, but again, I don't
11 want you to connect anything that you say with any of your
12 pending motions or responses by the Government. Now this
13 should be obvious, there should be no references today to the
14 identity or content of any sealed documents; i.e., the
15 documents that are at issue with respect to the motions to
16 unseal. So no one should be referencing anything that they
17 know to be under seal in those documents or even what
18 documents are under seal.

19 That is an exception to what I just said about
20 public information, because that information is not public. I
21 just want to make sure everyone understands.

22 I know there will be references perhaps to document
23 numbers or docket numbers, that is fine, that doesn't identify
24 what document is actually under seal. I'm going to give you
25 an example of how there might be some distinction. There has

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1 been made public the fact that a presentence report is one of
2 the documents at issue, that was a subject of prior public
3 court decisions, as well as prior submissions that have been
4 made public on this docket, as well as other dockets relating
5 to this matter. So you can reference the fact that the PSR,
6 as it's known, is the one of the documents at issue. But
7 nothing about the content of the PSR itself should be referred
8 to unless and until we end up in a closed proceeding. Because
9 that is a document that I believe does contain sensitive
10 information. And the Government, as everyone knows, has made
11 an application to seal the courtroom.

12 At the point that it becomes necessary for them to
13 give a fuller explanation regarding its request that certain
14 documents remain under seal, as everyone is aware of, that on
15 the Intervenor, Amicus, respondent side.

16 MR. LERNER: I believe that motion was filed this
17 morning.

18 THE COURT: That's correct.

19 MR. LERNER: Which does not comply with Richmond.

20 THE COURT: The exception I would --

21 MR. LERNER: Advance notice that the Court may
22 entertain a motion to seal.

23 THE COURT: The exception to that I think would be
24 that obviously before last Thursday's hearing I noticed all
25 the parties that I had intended to close the proceedings

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1 overall, because of my view that it would contain certain
2 information, or at least certain information would be
3 elicited, that would comply with the constitutional standards
4 for closure. So that issue was thoroughly discussed at the
5 last hearing on Thursday. I don't think any party can claim
6 that they had no notice that was a likely outcome. The only
7 difference is a technical one, which is that the Government
8 wasn't the moving party but rather the Court had communicated
9 to everyone that I had intended at that time to close the
10 proceedings entirely. But based on the hearing and the
11 submission by the moving parties, I, as you know, decided not
12 to close the entire proceedings but to start at least
13 initially with a public proceeding. And then only at the time
14 that it becomes necessary, based on a finding that I have to
15 make, close the proceedings. So I overrule the objection you
16 make, but I understand what you're saying. I find that here
17 no parties are prejudiced at all.

18 MR. LERNER: That's correct, no party is prejudiced,
19 but the notice, the requirement of notice is noticed to the
20 public. It's the public who is prejudiced not having the
21 motion docketed and noticed with the reasons therefore on a
22 public docket safely in advance of this hearing for them to
23 come in and object.

24 THE COURT: I disagree with that as well. Because
25 in the docket entry that we posted on Thursday after the

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1 Thursday hearing, I indicated that there was a possibility of
2 closure at the time that I find that the criteria are met. So
3 even the public would have notice that this hearing while
4 being conducted initially in public could eventually end up in
5 a closed proceeding once I made a finding. And obviously the
6 fact that I haven't yet made that finding is because I haven't
7 heard enough at this point in terms of argument from both
8 sides. And also that's not the requirement that I already
9 make the findings, simply that the public knows that this
10 proceeding might be closed. Again, I think the only
11 difference is the Government hasn't yet filed its motion, but
12 I find that to be a technical difference without any material
13 consequence.

14 Did you want to say anything?

15 MR. WOLF: No, your Honor.

16 THE COURT: Oh, okay. All right. So I hope we're
17 clear on what the ground rules are for today's argument. But
18 if any party has any doubt, I suggest you ask for a sidebar so
19 you don't run afoul of any rule or require us to have to
20 redact anything or seal anything at that time.

21 Now, I want to address a couple of preliminary
22 issues before we start. The first one has to do with the
23 direction I made at the last hearing on Thursday that all the
24 parties submit under seal proposed redacted versions on the
25 Government and John Doe's side of their unsealing response or

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1 their response of the unsealing motions, and on the Intervenor
2 Amicus and respondent sides, their objections to the closure
3 of the courtroom. And the Government and John Doe did submit
4 close to the deadline, which was noon on Friday, their
5 proposed redacted submissions. And those were unsealed on
6 Friday after noon shortly after they were received and after I
7 had a chance to review them. However, Mr. Roe and the Amici
8 did not file their proposed submissions until well-after the
9 deadline; Mr. Roe about 2:30 and the Amici theirs about 4:30.
10 Due to the types of the submissions we weren't able to
11 publicly file them until this morning. There was nothing
12 problematic about the Amicis redactions, so those remain as
13 they were. And obviously that document is available now in
14 the public docket.

15 However, with respect to Mr. Roe's original
16 response, which was that he did not believe that anything need
17 to be redacted, I did take issue with a sentence or two that I
18 felt needed to be redacted. Because I think he touched upon
19 the content of some of the documents that are at issue here.
20 You'll see I made some redactions. You can make whatever
21 objection you want to, but those were also posted as of today.

22 MR. LERNER: May I object now?

23 THE COURT: Yes.

24 MR. LERNER: The sentences that your Honor redacted
25 are public information, was made public in briefs to the

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1 Second Circuit. So if I may -- and also on other dockets.

2 THE COURT: But don't reference the information.

3 MR. LERNER: I won't, I will just state I can
4 supplement and demonstrate where that information is public.
5 If I may, perhaps the Court will reconsider.

6 THE COURT: That sounds fine. To be honest, I acted
7 out of an abundance of caution. I was not sure of the
8 provenance of that information, since it sounded like it might
9 have come from a non-public source. I decided that I would
10 for now redact it in the interest of at least releasing your
11 letter before today's hearing, and then I'll give you an
12 opportunity to submit something under seal if necessary
13 exparte. But I don't think that's necessary to justify why
14 those special references should also be made public. Okay.
15 So for now we'll table that or defer it to later. Can you
16 submit something by close of business today or by noon
17 tomorrow?

18 MR. LERNER: Thank you.

19 THE COURT: Since I know you're a little busy at the
20 moment.

21 All right, now the second issue has to do with the
22 Government's redacted letter, which as I mentioned a moment
23 ago was filed shortly after noon and then it was discovered
24 that there was a technical defect with the copy that was filed
25 originally by the Government. This was actually brought to

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1 the Court's attention by Mr. Langford's office who accessed
2 the document.

3 As soon as that was discovered the Government's
4 letter, the redacted letter, was sealed again and then a
5 corrected version was reposted by the clerk's office. So I
6 want to confirm though because the clerk's office has advised
7 me that you, Mr. Langford, represented that you and your
8 client, although you had downloaded the electronic version of
9 the document, have since destroyed all electronic copies or
10 versions of the document that you and your client have; is
11 that correct?

12 MR. LANGFORD: Yes, your Honor. To the best of my
13 knowledge as soon as we, as soon as I recognized the problem I
14 conveyed to my clients that they should destroy the documents,
15 without conveying the technical difficult. And my clients
16 both confirmed that they destroyed the documents. I then
17 destroyed the documents, co-counsel destroyed the documents.
18 And the documents were initially uploaded to a shared drive
19 that the clinic uses that is secured. They've been removed
20 from that shared drive to the best of my knowledge. To the
21 extent that they are somewhere in the ether, which I don't
22 understand, by which I mean --

23 THE COURT: The cloud.

24 MR. LANGFORD: The cloud. I believe they have been
25 removed from every place that we know how to remove them from

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1 and have been entirely destroyed.

2 THE COURT: And everyone who works with or for you
3 has been instructed not to download or save or use that
4 electronic version of the Government's letter?

5 MR. LANGFORD: Yes, your Honor.

6 THE COURT: Thank you very much, Mr. Langford. One
7 last question, did you also confirm that nobody used that
8 document in that version before you instructed them to destroy
9 it and not use of whatever copy you had?

10 MR. LANGFORD: I recognized it approximately two
11 minutes after I e-mailed the clients. I e-mailed them a
12 second time at that point, so I did not specifically confirm
13 whether the client, whether they did not use the document.

14 MR. BEHAR: I didn't read it. I just destroyed it.

15 THE COURT: With respect to the share drive, how
16 many people have access?

17 MR. LANGFORD: Only members of the clinic have
18 access, that is realistically between 14 and 16 individuals,
19 perhaps one administrator. They were deleted almost as soon
20 as they went on to the share drive. So to the best of my
21 knowledge they don't exist on any of our systems.

22 THE COURT: Do you have any ability to determine who
23 might have accessed the documents from your share drive before
24 it was deleted? I know it seems like a very small pocket but
25 I just want to get a sense of whether or not I need to have

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1 one more curative measure taken by you, which is to confirm
2 with everyone that they didn't download it.

3 MR. LANGFORD: I can do that. I believe we have
4 that capacity. I just have to circle up with the
5 administrator who runs that system.

6 THE COURT: Remember the court reporter has to catch
7 every word you're saying. Speak a little slower and a little
8 louder.

9 If you will by the close of business tomorrow
10 confirm that you have talked to or communicated with everyone
11 who has access to the drive and confirm that they did not
12 download that version of the letter, or that if they did that
13 they destroyed it.

14 MR. LANGFORD: Yes, your Honor.

15 THE COURT: Thank you very much, Mr. Langford.

16 Turning to you, Mr. Lerner. The records show that
17 you also accessed the Government's first redacted letter
18 shortly I think after it was posted. Did you electronically
19 download or save that document?

20 MR. LERNER: I didn't have any problem downloading
21 it.

22 THE COURT: I'm going to ask you to destroy the
23 electronic version you have of the document. And if you want
24 to re-access the one that was reposted thereafter, which is
25 corrected.

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1 MR. OBERLANDER: Your Honor --

2 THE COURT: No, no, I want to hear from Mr. Lerner.

3 MR. LERNER: I didn't know there was any problem
4 with the document. And being that it was the public version,
5 I e-mailed it to reporters right after I downloaded it. So I
6 imagine there are people in the audience who have it as well
7 and others. But I had no problem. I'm not sure what the
8 problem is with the document.

9 THE COURT: Can you provide a list of everyone to
10 whom you e-mailed it.

11 MR. LERNER: I believe I can.

12 THE COURT: It should be in your e-mail transaction
13 file.

14 MR. LERNER: Uh-huh.

15 THE COURT: So similarly, by the close of business
16 today will you, one, confirm with me that you've destroyed the
17 electronic version that you downloaded. And if your client,
18 Mr. Roe, got one, that he also destroyed it. And then provide
19 a list of everyone that you sent it to as well.

20 MR. LERNER: Sure.

21 MR. LANGFORD: Just for clarification, your Honor,
22 you said close of business tomorrow with respect to me, and
23 close of business today for Mr. Lerner.

24 THE COURT: I'm sorry, close of business tomorrow
25 for you too, Mr. Lerner.

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1 In terms of turning to the Government, is there
2 anything else? I don't know the preliminary measures that you
3 believe I should do with respect to this issue?

4 MR. NORRIS: No, your Honor. I thank the Court for
5 taking these measures and specifically thank Mr. Langford for
6 bringing it to the Government and the Court's attention.

7 THE COURT: The other thing, Mr. Lerner, I'll do is
8 I'd like you to communicate to the individuals or entities to
9 whom you sent that letter that they are being instructed by me
10 through you to destroy the electronic versions that they have.
11 I know that you may not agree with it, I'm just asking you to
12 communicate that.

13 MR. LERNER: I will do that. But the Court does not
14 have jurisdiction over, but I will nonetheless so advise them.

15 THE COURT: They can raise that issue, but I'm just
16 asking you to communicate the message. Then also let me know
17 to whom you sent it, and then also that you sent them that
18 communication.

19 Okay, let's turn now -- let me ask you, Amicus,
20 Mr. Kaufman.

21 MR. KAUFMAN: Yes, your Honor.

22 THE COURT: I don't believe that you downloaded --

23 MR. KAUFMAN: No, I didn't.

24 THE COURT: -- the Government's redacted letter; is
25 that correct?

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1 MR. KAUFMAN: That's correct.

2 THE COURT: You just printed it out? At some point
3 did you access it?

4 MR. KAUFMAN: I don't believe I did at all. I was
5 busy with my own things; I wasn't focused on that.

6 MR. LERNER: I think Mr. Kaufman, you may be one of
7 the individuals I e-mailed to and perhaps --

8 THE COURT: Mr. Kaufman, if in fact you go back to
9 your office and find you received an e-mail copy of it I'll
10 ask you to destroy it as well and confirm by close of business
11 tomorrow that you've done that.

12 MR. KAUFMAN: All right, your Honor. I apologize
13 your Honor for the late filing of our redacted letter. I can
14 give you my tale of woe.

15 THE COURT: It's not necessary, we have a lot to
16 cover.

17 All right, I think I've covered all the parties who
18 might have gotten that letter.

19 What I need to do now is make a finding regarding
20 the redactions that I allowed all the parties to make. So I
21 do find that allowing the parties to do this and then only
22 releasing the unredacted portions of everyone's submissions
23 meets the standards that apply here. So I do find that those
24 redactions -- rather, I do find that there was a substantial
25 probability or there is a substantial probability of prejudice

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1 or harm to a compelling interest of the Government and John
2 Doe that allowing these redactions will protect. Specifically
3 some those compelling interests are the integrity of
4 Governmental investigations, the safety of individuals, and
5 also enabling law enforcement to secure future cooperation
6 from individuals. I also find there are no reasonable
7 alternatives to these redactions that would adequately protect
8 those compelling interests. I also find that the redactions
9 were quite nearly tailored, and in some cases only a few words
10 or a few sentences. And that lastly that the redactions will
11 be effective in protecting the threat interest of the
12 Government and John Doe.

13 I make one additional note. I said this throughout
14 the proceedings, I also view my role as a Special Master as
15 limiting my authority with respect to unsealing any
16 information that's currently sealed in the Circuit. As I
17 mentioned before, I'm acting at the behest of the Second
18 Circuit to make some findings and recommendations to them, but
19 otherwise I haven't been given carte blanche to unseal
20 documents in this matter, or unseal documents that are filed
21 in the Circuit. So that provides yet an additional reason
22 that I think the redactions are appropriate because it
23 preserves the sealing order of the Circuit as to which I have
24 no authority to undo.

25 MR. KAUFMAN: Your Honor, for the Amici -- forgive

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1 me for not standing up. As you're aware I believe the Amici
2 have been active in attempting to get all of the motion papers
3 as opposed to the underlying documents unsealed. You told us
4 before that you felt you didn't have the authority under the
5 reference from the Second Circuit. We took some kind of an
6 appeal or whatever, and the Circuit has never expressed itself
7 on the issue. Can I -- is this an appropriate time for me to
8 move your Honor to advise the Second Circuit of your view --

9 THE COURT: Yes, I think --

10 MR. KAUFMAN: -- in regards to the motion papers?

11 THE COURT: -- I think I explained that at the
12 Thursday hearing. That one of the topics you can address is
13 your pending motion to unseal all of the motion papers at the
14 Circuit. I do think that it's within my role to make some
15 recommendation on that issue. I think in response, maybe to
16 Mr. Langford's question or someone's, I said you should
17 include that as part of your argument today, that you think
18 for various reasons that those motion papers should be
19 unsealed to the Circuit. I will make the recommendation as
20 appropriate to them.

21 MR. KAUFMAN: Thank you.

22 THE COURT: One last matter we have to deal with
23 before getting to the substance of the documents.
24 Mr. Oberlander filed this morning a request to appear as a
25 friend of the court, but I'm going to deny that because

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1 Mr. Oberlander is already involved in this matter as a party
2 and he's represented by Mr. Lerner. I don't see any reason to
3 allow Mr. Oberlander to make, in effect, a second appearance
4 on his own behalf.

5 Mr. Lerner will be your spokesman as you've chosen,
6 Mr. Oberlander, and as is part of the record before the Second
7 Circuit. Again, here I feel that while theoretically I might
8 admit a friend of the court, it certainly did not make sense
9 here where Mr. Oberlander's appearance has been made through
10 Mr. Lerner in the Circuit and that has been the case here as
11 well. I deny the request for Mr. Oberlander to appear as a
12 friend of the court. I will hear from Mr. Lerner only with
13 respect to Mr. Oberlander's interests.

14 MR. OBERLANDER: I'm sorry. Just for the record, I
15 obviously respect your decision. Technically I was asking for
16 an ex-friend standing. Because I don't have the same
17 interests for myself as an appellant as people who should be
18 here but are not. Therefore, what I technically requested was
19 to be recognized as having ex-friend standing. I don't think
20 it's a distinction or a technical difference, but it was to
21 give me standing that I don't have an appellant. I respect
22 that you're denying. I wanted to note that for the record.

23 THE COURT: So you noted your objection. I'm
24 denying that request.

25 Let's get now to the issues at hand. I'll hear from

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1 the parties who are moving for unsealing. I think that since
2 Mr. Roe is the respondent/appellant we'll start with him,
3 followed by the Intervenor, and last Mr. Kaufman for Amici.

4 I'd appreciate it if you had don't repeat arguments.
5 I know everyone probably prepared a presentation, but if you
6 hear an argument being made by your co-counsel -- I'll call
7 you all loosely -- you need not to repeat the same argument.

8 MR. LERNER: Reading from an unsealed letter, letter
9 dated March 17, 2011, unsealed by Judge Glasser on I believe,
10 on or about the 14th or 15th of March, 2013. It was a letter
11 by the Government asking that Judge Glasser take up the
12 unsealing of the 98-CR-1101 case. The Government stated,
13 "Here the compelling" --

14 THE COURT: Slow down.

15 MR. LERNER: "Here the compelling factors at issue
16 are the safety of the defendant and his family and law
17 enforcement's interest in procuring cooperation from other
18 defendants."

19 THE COURT: Stop. When people read they go too
20 fast. You have a court reporter who has to take down
21 everything you say.

22 MR. LERNER: Would you like me to hand up copy of
23 the letter?

24 THE COURT: You can give a copy to the Government --
25 that won't help the court reporter -- and your colleagues.

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1 MR. LERNER: Starting over. "Here the compelling
2 factors at issue are the safety of the defendant, and his
3 family and law enforcement's interest in procuring cooperation
4 from other defendants now and in the future. That Government
5 revealed the defendants criminal conviction in a March 2,
6 2000, press release necessarily influences that balancing
7 test. The Government has no information that any person has
8 sought to harm the defendant or his family since the press
9 release was issued, nor that the Government's ability to
10 secure cooperation has been negatively effected.

11 Now it has been five years or more since AUSA
12 Kaminsky stood up before the Second Circuit just one month
13 earlier on the now-unsealed transcript and said it was
14 necessary to maintain sealing in order to protect Mr.--

15 THE COURT: Mr. Doe.

16 MR. LERNER: Mr. Doe. That argument that he made on
17 February 14, 2011, was abandoned one month later by this
18 letter. It's been years and he hasn't been -- he's still
19 alive and well. There is no compelling reason whatsoever for
20 his safety to maintain any further sealing on any documents.

21 There is an important reason as well why this entire
22 case must be unsealed. And that is, I'm reading from an
23 unsealed letter dated January 26, 2012, page nine, this is the
24 Government reciting that in secret it moved at the Second
25 Circuit to unseal. I'm reading from a public letter, "In its

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1 summary order of June 29, 2011, the Second Circuit also
2 remanded with instructions for this Court, quote, to rule upon
3 the Government's unsealing motion of March 17, 2011, unquote."
4 That is what I just read to your Honor. "Subsequently on
5 August 2, 2011, the Government moved under seal and exparte
6 with respect to Roe to modify the summary order to remove that
7 instruction." In other words, there was a public document
8 referenced in a public decision that said the Government had
9 moved to unseal and ordered the judge to take it up. And yet
10 in secret the Government moved to retract that at the Second
11 Circuit.

12 This makes this the incredibly, incredibly of
13 interest to the public how the Government could in secret move
14 to change an order so that the Judge Glasser would not take up
15 the unsealing, which the Second Circuit had ordered him to
16 take up, and which the Government had asked him to take up.
17 So there is -- we submit that there is an issue of overriding
18 misconduct. We submit it's prosecutorial misconduct. And
19 regrettably, it may be judicial misconduct, because that
20 submission should have been made known to the public that the
21 Government was moving in secret to try to undo what the Second
22 Circuit had ordered in public.

23 THE COURT: Let me ask you a question though, the
24 Government does fairly frequently submit such requests in
25 camera for the obvious reason that the request is based on

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1 information that it would undermine a compelling Government
2 interest. Then the judge has to make a determination on his
3 or her own that that request to file such information under
4 seal and exparte is appropriate. So here you may be accusing
5 the Government of doing something improper, but ultimately the
6 judge, Judge Glasser, and I think some at point later the
7 Second Circuit, did in effect ratify or approve that course of
8 action or conduct.

9 I mean, that's how the process works. Yet you're
10 suggesting that something nefarious happened simply because it
11 was filed after seal, after an initial decision about making
12 something public. Certainly circumstances can change or
13 something that comes to light later would effect that public
14 decision that went before it, the antecedent decision. That
15 doesn't make it wrong, especially if you have two judicial
16 authorities approving that. That's my concern. I know you're
17 suggesting the judicial misconduct, that's a hard one for me
18 to accept.

19 MR. LERNER: It was the exparte nature of that
20 submission, which made it, I submit, improper. It was made
21 without notice to Mr. Roe, that an order which came down
22 directing the Judge to take up a motion to unseal, was
23 secretly being withdrawn or the request was made that it be
24 withdrawn. What happened was the Second Circuit said no, take
25 it up with Judge Glasser. And Judge Glasser subsequently in

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1 an unsealed order later in August indicated that he did allow
2 him, in secret, ex parte, to withdraw their motion, March 17,
3 2011 motion.

4 That order was sealed to the public until March 14,
5 2013, a week or ten days before the U.S. Supreme Court was to
6 decide Mr. Roe's petition for certiorari.

7 I've noted in my submission of this morning that the
8 crime victims have a right to be here. Under 3771 of the
9 Crime Victims Rights Act, the Government has an obligation to
10 notify crime victims of all public court proceedings and this
11 is a very public court proceeding. The Court, and here it
12 would be the Second Circuit, has an obligation to ensure that
13 the Government do its job and fulfill its responsibility to
14 notify victims of this proceeding. We certainly know that
15 there are victims, because Klotsman, his co-defendant, was
16 ordered to pay restitution. And there was certainly known
17 victims. There was letters in the file identifying victims,
18 in the capo file, and in the files of co-defendants.

19 The Government has failed in its obligation
20 investigation to notify Sater's victims of this proceeding,
21 and all the proceedings for that matter that have occurred
22 from 1998 through the present. These are proceedings not only
23 in the Eastern District, but Second Circuit, and even in the
24 U.S. Supreme Court where they have a obligation to notify the
25 victims that a case was brought before the court.

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1 THE COURT: So it's your position that the
2 Government has an obligation to notify the alleged victims of
3 John Doe's crimes of any request to unseal documents at the
4 Circuit level.

5 MR. LERNER: 3771 requires notice of every open
6 court proceeding to the victims. They have not been notified.

7 It has been the Government's position that it was
8 necessary to keep Mr. Doe's cooperation secret. That if that
9 information were to get out, he could come to harm, it had
10 been that position. It was abandoned on March 17, 2011.

11 But the idea that that information became public or
12 became known to the La Cosa Nostra members of organized crime
13 because of anything Mr. Roe did or that I did is, I submit, a
14 fraud on the Court. Because the victim -- the co-defendants
15 pursuant to Brady and Giglio, were notified that Felix
16 Sater -- withdrawn, that Doe was a cooperator. Because in
17 2000 and 2001 and 2002 they all knew. And I can hand up
18 letters to the Court showing that they had been informed back
19 in November 20, 2001, one of the defendants, Lawrence Ray, was
20 told that John Doe was a cooperator. There is a memo of law
21 submitted in support of Daniel, defendant Daniel Lars'
22 pretrial motion where they sought information on the
23 Government cooperator. And I'll use the fictitious names when
24 I read aloud. "According to the Government, cooperating
25 witness, Gennady Klotsman and John Doe, served as solicitors

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1 of Lev for his investment. Therefore, the lion's share of
2 proof against Lev will come from the mouths of these
3 cooperators."

4 This is a memo of law which was filed with the court
5 on behalf of defendant Lev by Lichtman, I believe. It was
6 joined in by all the defendants. It's filed November 16,
7 2000.

8 They all knew, they've known for over a decade,
9 almost 20 years, that John Doe has been a cooperator. And the
10 idea that he might come to harm as a result of any information
11 that might come to light now is preposterous.

12 THE COURT: Can I suggest to you one thing, though,
13 obviously the fact that his being a cooperator is potentially
14 dangerous for him, but as you say, thankfully no harm has come
15 to him. There is a difference between knowing, since he is a
16 cooperator, and knowing what he might have done for the
17 Government and who he cooperated against.

18 MR. LERNER: I have no such information. I don't
19 believe any Amici or Intervenors have any such information.
20 The only one who told that information in public is
21 Mr. Sater -- sorry.

22 THE COURT: Mr. Doe.

23 MR. LERNER: Mr. Doe himself, when he spouts to
24 various members of media and tells them what he's doing.
25 There is a website, I believe called NarcoNews, which I didn't

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1 bring with me, where he talks about what he's done for the
2 Government. There are other reporters he's spoken to. I
3 think he spoke to Mr. Behar and told him what he has done.
4 Mr. Behar has counsel who can speak for him. I believe it's
5 out there. Mr. Doe himself has said what cooperation he
6 provided to the Government.

7 THE COURT: Certainly some, right?

8 MR. LERNER: Whatever he has disclosed certainly
9 cannot be redacted. But as far as for information that he
10 actually did, I don't have that information. We've never had
11 that information. It wasn't in the PSR. It wasn't in the
12 cooperation agreement. It wasn't in the proffer.

13 THE COURT: But you must admit there could be some
14 information that you don't know that could actually subject
15 him to a to a potential risk of harm were it to be disclosed.
16 It's certainly theoretically possible.

17 MR. LERNER: I would call Rumsfeld on this one.

18 THE COURT: It's clearly possible that some of the
19 information you don't know could still subject him to some
20 harm, notwithstanding the fact that his actual cooperation
21 with the Government has been revealed or was revealed a number
22 of years ago.

23 MR. LERNER: I will acknowledge the theoretical
24 possibility. However, for First Amendment purposes, theory
25 isn't enough. It has to be a concrete showing of specific

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1 harm.

2 THE COURT: Potential not actual harm.

3 MR. LERNER: Reasonably threat.

4 THE COURT: Agreed.

5 MR. LERNER: Thank you.

6 THE COURT: Thank you, very much. Mr. Langford?

7 MR. LANGFORD: Thank you, your Honor. I would take
8 a step back for just a moment and talk about the right of
9 access generally. It's as well established in this Circuit
10 and around the country that there is a First Amendment right
11 of access to court proceedings and to certain court documents.
12 The purpose of the right of access couldn't be clearer, in
13 which newspapers and the Supreme Court over and over again
14 iterated and iterated and reiterated that the right of access
15 ensures that the public can see what is going on in its
16 courts. In footnote nine, the Court compiles, I guess it's a
17 number of statements from his prior jurisprudence talking
18 about the notion that court proceedings are public property.

19 In this particular matter the right of access
20 couldn't be more important. This case, as it has been widely
21 reported and is publicly known, implicates integrity interest
22 of the highest order, both of the EDNY, of this, Court, of the
23 Second Circuit in this proceeding; but more importantly now of
24 the relationship between the defendant in this case and the
25 President of the United States. There is not a lot of dispute

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1 on the other side the right of access attaches to the records
2 the Intervenors and Amici are asking to be unsealed here.

3 But I think it's important to quickly run through
4 the idea that the right of access clearly attaches to
5 appellate proceedings, clearly attaches to appellate rule
6 arguments, it clearly attaches to substantive briefing. To
7 the extent that the Government and United States Attorney's
8 Office argue that certain documents in the Second Circuit are
9 not judicial documents and therefore not subject to the right
10 of access, I think that argument is misplaced. Hartford
11 Courant makes it very clear that the vast majority of
12 documents, including the docket sheet itself that are
13 submitted to the court are subject to the First Amendment and
14 common law rights of access.

15 The government and plaintiff Doe's attorneys object
16 to the characterization of technical filings of judicial
17 documents. But the only documents that fall outside of the
18 judicial document caveat are the ones that play no role in the
19 performance of Article III functions, that's a quote from
20 Amodeo. I think that it's very clear that this argument hubs
21 around whether the right of access is overcome, not whether
22 the right of access attaches to the documents in this case.

23 If the Government or Mr. Doe's attorneys would like
24 to argue otherwise, I will go back and forth with them. I
25 think that point is well-established by both the case law in

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1 this Circuit as well as case law around the country. I would
2 note that that case law extends to filings and proceedings
3 related to unsealing dockets. Ninth Circuit specifically held
4 that when there is unsealing motion in an appellate form, the
5 right of access attaches to any argument and to the papers
6 submitted in connection.

7 Turning to the substance with the Government's
8 position on sealing. In their letter, the redacted letter,
9 the Government contends that the documents they would like to
10 withhold would represent a substantial probability of
11 prejudice to compelling interests of the defendant,
12 Government, or third-party such as the integrity of Lev,
13 investigations, danger to persons, and privacy interests.
14 They cite for that proposition United States V. Doe.

15 I just would like to point out to the Court, that
16 when you turn to United States V. Doe, what the Second Circuit
17 says is compelling transaction may include the defendant's
18 right to a fair trial. That's not an issue in this case.
19 Mr. Doe pled guilty 19 years ago, was sentenced in 2009.
20 There is no compelling interest in a fair trial. There is no
21 trial.

22 They may include privacy interests of the defendant,
23 victims or other persons. Mr. Doe has self-identified in many
24 public forums. He continuously is speaking to reporters about
25 his cooperation with the Government. I don't think that there

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1 is a legitimate argument that Mr. Doe's identity is a
2 compelling privacy interest in this case. There may be other
3 people identified in these documents who's privacy is sort of
4 still intact with respect to these proceedings. I would
5 suggest that it's incumbent on your Honor to take a very close
6 look at the documents and make sure the redactions do not
7 inappropriately protect privacy.

8 Another compelling Governmental interest can include
9 the integrity of significant Government activities entitled to
10 confidentially, ongoing undercover investigations. As far as
11 we know, there is no ongoing investigation. We can't counter
12 that entirely, we don't know. But I would suggest that it is
13 important that the Government, at the very least, carry a
14 burden of demonstrating that there is an ongoing
15 investigation, not just that there have been investigations.

16 THE COURT: But you would agree, if there is
17 evidence of ongoing investigations that might be an interest
18 that should be protected by some form of restriction on the
19 disclosure of the information.

20 MR. LANGFORD: Yes, your Honor, were the caveat that
21 it must meet the other three prongs: That no alternative is
22 available, that it's narrowly tailored, and it's effective.

23 THE COURT: Let me ask you that question, if you do
24 find that there is a prejudice or potential prejudice or harm
25 to a compelling Government interest, let's just pick the

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1 example ongoing investigations being comprised, what would you
2 say is a reasonable alternative short of keeping that
3 information sealed and not in the public record?

4 MR. LANGFORD: It may well be, your Honor, that
5 there is no reasonable alternative to some sealing in those
6 instances.

7 But I think when you come up on a scenario in which
8 the right must be limited, it still must be limited as
9 narrowly as possible. The same interest that would have
10 justified sealing in 1998, in 2010, in 2011, in 2016, are not
11 necessarily interests sufficient to justify closure here.
12 Some of these investigations have concluded. If these are
13 investigations in the sense that they are ongoing for 19
14 years, I would suggest that perhaps that happens in the
15 unusual case and maybe that's the case here, but it's the
16 Government's burden to demonstrate there is a real ongoing
17 investigation that could be hampered by disclosure of these
18 documents.

19 The last interest of the Second Circuit identifies
20 in danger to persons or property. There I actually want to
21 push back slightly on what Mr. Lerner said in terms of what we
22 know about Mr. Doe. We know his identity, we know that from
23 Mr. Doe himself and we know that from separate sources. I
24 would turn to first the Government's own acknowledgment of the
25 extent of Mr. Doe's cooperation. This is from the publically

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1 available February 14, 2011, Second Circuit transcript. There
2 I believe Mr. Kaminsky said, I quote, "Mr. Doe cooperated,
3 unlike some cooperators who cooperated within one type of
4 organized crime family or over one type of crime, Mr. Doe's
5 cooperation runs a gamut that is seldom seen. It involves
6 violent organizations such as Al-Queda, it involves foreign
7 Governments, it involves Russian organized crime, and most
8 particularly it involves various families of La Cosa Nostra.
9 By that specifically I mean an individual on the ruling board
10 of the Genovese crime family, a captain in the Bonanno crime
11 family" -- I don't know the correct pronunciation of that --
12 "a soldier in the Gambino crime family. The list goes on and
13 on." That's the Government's own words.

14 Next I would turn to --

15 THE COURT: I want to point out, Mr. Langford, that
16 you should appreciate that those types of investigations
17 certainly have more longevity than some. When you talk about
18 RICO offenses in theory they could go on quite indefinitely.

19 MR. LANGFORD: I believe --

20 THE COURT: Or they can be prosecuted fairly long
21 after they start the investigation.

22 MR. LANGFORD: I'm sure your Honor knows more than I
23 do on that, but I would also suggest that to the extent that
24 it is well-known publicly the names of the specific crime
25 families against which Mr. Doe has cooperated, then the notion

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1 that there is still a compelling interest in protecting him
2 for his own safety, for example, is not sufficient to overcome
3 the First Amendment right of access. To the extent that it
4 could interfere with an ongoing investigation, in that somehow
5 La Cosa Nostra has missed that Mr. Doe has cooperated against
6 them, potentially there is an argument. I think that is a
7 high burden to carry on the Government's side.

8 I just wanted to point to Loretta Lynch's testimony
9 before Congress in September 2015. Perhaps, your Honor, I can
10 go back to that. I'm sorry about that. It is in the record.
11 I'm sure your Honor is aware of it, but in her 2015 testimony
12 before Congress, Presumptive Attorney General Loretta Lynch at
13 that point acknowledged with a good deal of specificity the
14 extent of Mr. Doe's cooperation with the Government, including
15 the number of years that Mr. Doe cooperated, the sorts of
16 investigations that he was involved in. That is, I think,
17 well established in the public record, both in public
18 reporting by some the very investigative journalists in this
19 room, including my client, also in the Government's own
20 acknowledgment of the 2011 hearing and Loretta Lynch's
21 testimony.

22 Before I make my next point I ask for a sidebar.

23 THE COURT: Why don't we have a sidebar. Everybody
24 come up.

25 (Continued on the next page.)

SIDEBAR

1 (Sidebar conference.)

2 MR. LANGFORD: Your Honor stated that nothing in the
3 PSR is to be disclosed. I don't have a copy of the PSR, but
4 in publicly available copies of the Supreme Court briefing
5 that was filed 2012 and 2013 there are a number of references
6 specifically to items in the PSR that I would like to
7 reference. The only confirmation I have that they are in the
8 PSR is that a briefing says they are in the PSR, but that's a
9 matter of public record.

10 MR. LERNER: Can I speak to that? I can clarify.

11 THE COURT: Go ahead. Was that your submission?

12 MR. LERNER: It was my submission to the Supreme
13 Court. It was filed under seal discussing the contents of the
14 PSR under seal with a motion to the U.S. Supreme Court
15 requesting that they unseal it, and they granted that. So the
16 contents of the statements in the PSR that I believe counsel
17 may have in mind are only those that were made public by the
18 U.S. Supreme Court itself.

19 THE COURT: Do you have a record cite for that? I'm
20 a little bit concerned.

21 MR. LERNER: It's available on Westlaw.

22 MR. LANGFORD: I have printing troubles. I have a
23 copy for the Court.

24 THE COURT: Let me see that.

25 MR. LERNER: I don't know if you have access to the

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1 U.S. Supreme Court docket, but it's 12-112. It shows my
2 motion. It was to file the cert petition under seal with
3 leave to file a public redacted version. That was granted on
4 June 25 I believe of 2012.

5 THE COURT: So this is the --

6 MR. LERNER: Redacted in accordance with --

7 THE COURT: What Mr. Langford has just handed me is
8 captioned Richard Roe et al Versus United States Versus John
9 Doe. It's docket 12--112 in Supreme Court. And at the top of
10 the document it says, "Redacted in accordance with the
11 June 25, 2012 order of the U.S. Supreme Court." And this is
12 Mr. Lerner's petition for a writ certiorari. So I'm looking
13 at redacted copy.

14 MR. LANGFORD: If you turn to page seven -- the
15 copies were supposed to be highlighted but they were not
16 printed out with highlights. You can see here.

17 THE COURT: But this is the document that you say
18 the Supreme Court later granted Mr. Lerner permission to
19 unseal, that's what Mr. Lerner is saying.

20 MR. LANGFORD: Yes, your Honor.

21 THE COURT: Let's do this, do you have anything else
22 that we need to address at sidebar? What I'd like to do is
23 give my law clerk a chance to confirm in fact this was
24 unsealed at some point. Then, what we can do is have Mr.
25 Kaufman speak next and give you a chance to find the reference

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1 to --

2 MR. LANGFORD: We located it, yes.

3 MR. LERNER: If your law clerk will looking at the
4 Supreme Court docket, the clerk will see that on June 25 there
5 was an order. It's on the docket, it's docket order. Then
6 one month later, I believe it was July 25, there is a
7 statement on the docket that says petitioner complied with the
8 order of June 25. What's being referred to is the filing of
9 this in accordance with the June 25 order was met -- the
10 requirement of the filing of this met the, complied with the
11 order.

12 THE COURT: When you say "this," this is a redacted
13 copy?

14 MR. LERNER: Yes.

15 THE COURT: You're representing at some point the
16 Supreme Court allowed you to unredact -- no.

17 MR. LERNER: Allowed the redacted version to be made
18 public, that is it what was made public.

19 THE COURT: Is the material from the PSR that you
20 want to reference in the redactions?

21 MR. LANGFORD: No, your Honor.

22 THE COURT: Give me an example, seven and eight.

23 MR. LANGFORD: On page seven, Mr. Doe's 2004
24 presentence report or PSR.

25 THE COURT: I see it noted.

SIDEBAR

1 MR. LANGFORD: "DOJ hadn't given the victim list
2 required by the mandatory Victims Restitution Act so probation
3 can contact victims about restitution."

4 THE COURT: But what is redacted here is the
5 reference to the presentence report -- wait, no, I'm sorry.
6 What is redacted there?

7 MR. LANGFORD: I don't know, your Honor.

8 THE COURT: Mr. Lerner, do you remember?

9 MR. LERNER: If your Honor would like to see the
10 unredacted petition I can hand it up, but I can't give it to
11 anybody else.

12 THE COURT: I'm trying to make sure that.

13 MR. OBERLANDER: Please --

14 THE COURT: The sentence as redacted means what you
15 say it means, that mainly it's saying that the PSR noted
16 because unfortunately with the redaction it's grammatically a
17 little confusing.

18 MR. LERNER: May I hand up the --

19 MR. WOLF: May I be heard on behalf of John Doe?

20 For years and years and years Mr. Oberlander,
21 through Mr. Lerner and otherwise, has been professing that the
22 Supreme Court authorized them to publish portions of the PSR
23 and other things. That's just a fallacy. There is any order
24 on this docket that I've reviewed that, one, shows an
25 application to do that. Or a subsequent order that says, sure

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1 go right ahead and file portions of the PSR.

2 THE COURT: Let me say this, though, if in fact it's
3 correct that this redacted petition appeared on a public
4 document, I'm looking at it directly, it does have a reference
5 to the PSR and in theory -- although this is where I'm having
6 some concern -- states some part of the contents, again, I'm a
7 little concerned about the grammatical awkwardness because of
8 the redaction, but if this was in fact filed publicly it just
9 supports what Mr. Lerner is claiming, that it was allowed to
10 be issued or publicly docketed and seems to contain some
11 reference to the presentence report.

12 MR. WOLF: Your Honor, what the docket indicates, I
13 believe this was made in advance just by Mr. Roe the appellant
14 seeking certiorari, without papers filed from other sides or
15 even notice to anyone else with a request to file redacted
16 copies of their petition, there is nothing that shows up as to
17 what they were going to put in their cert petition. But let
18 me say this --

19 THE COURT: If we go to this Westlaw site we'll get
20 this exact document that I'm looking at?

21 MR. WOLF: Correct. And all the Supreme Court says,
22 file redacted. It indicates what it says on the docket, the
23 identities of the parties and everything. The reason I'm
24 saying this, is this has been raised over and over again, both
25 in the Second Circuit and with Judge Cogan. There is Supreme

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1 Court imprimatur matter that this is okay to publish anything
2 from the PSR when there hasn't been.

3 THE COURT: I'd hate to be sort of obvious about
4 this but, the document I'm looking at which all parties seem
5 to agree, was actually posted on the public docket in the
6 Supreme Court in redacted form, does contain unredacted
7 references to the PSR and its contents. So for example, there
8 is a sentence that we've been focusing on, which is on page 7,
9 first full paragraph underneath the heading II et cetera.
10 Then even further down on that same page it says that "PSR
11 also shows the probation officer, though charged with warning
12 employers and others of recidivism risk, knew Doe had been
13 working since 2002 as a partner at that real estate
14 development firm," then it goes on and has a record site. It
15 also has other information about the PSR and the officer's
16 statements in the PSR.

17 So I don't know how an argument can be made that in
18 fact the Supreme Court did sanction, I mean approve or allow,
19 the disclosure of certain information from the PSR in this
20 public filing.

21 MR. WOLF: I was not involved in the case at this
22 point.

23 THE COURT: Do you dispute this is on the public
24 Supreme Court docket?

25 MR. WOLF: I believe it is, yes.

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1 THE COURT: You believe that it is.

2 MR. WOLF: I believe so. We can access to the
3 docket. My point is this, your Honor, it's been represented
4 over and over, and perhaps that representation is relevant or
5 not, that somehow the Supreme Court was, one, told that there
6 is PSR references; and two, authorized it in Court, which is
7 something that is just false.

8 This was raised in front of Judge Cogan. It was
9 raised with the Second Circuit, this whole Supreme Court
10 thing, and all the decisions consistently afterwards of the
11 court, Second Circuit and Judge Cogan, at a minimum have
12 rejected any motions that there can be any references to the
13 PSR.

14 THE COURT: But why can't they reference this
15 decision, or this brief if it wasn't sealed? I suspect that
16 the problem we have --

17 MR. LERNER: May I be heard for?

18 THE COURT: Hang on for a second. The only
19 potential issue is that these are just the contentions, it
20 seems, of Mr. Lerner or Mr. Roe by Mr. Lerner, that would be
21 one argument as to why it shouldn't come in. Not really why
22 it shouldn't come in, but why I shouldn't consider it or why
23 it shouldn't be construed as truthful and accurate
24 representation of what is in PSR. It's not a decision of the
25 Supreme Court, rather only Mr. Lerner's summary of what was in

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1 the PSR.

2 MR. LERNER: Under the rules of the U.S. Supreme
3 Court, the factual statements in the petition for cert are not
4 rebutted, they are deemed true of the purposes of the cert
5 petition. Moreover, my motion I made to requesting that it be
6 made public, specifically cited the reasons and indicated that
7 the petition does make references to the PSR, and requested
8 permission to make those statements public. It was granted
9 for the purpose of telling the media and potential Amici what
10 was going on in this case. My motion was granted.

11 The motion was served on the Government. It was
12 served on Mr. Doe's counsel. There was no opposition to my
13 request for relief. I have proof of service.

14 It's a little late for Mr. Doe to be making an
15 argument about that motion for leave, to make that petition
16 for cert public or challenge any facts in it when they were
17 not challenged.

18 THE COURT: What I'm thinking about here is what
19 significance this has, if any, on the question of disclosing
20 or allowing the disclosure of the presentence report in toto
21 or even as to these particular allegations. Again, this is,
22 at least this brief I'm looking at, is simply your
23 representation of what the PSR says. And then you would claim
24 that beyond that, because it was unrebutted it should be
25 accepted as true.

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1 But again, regardless of all that, how does it go to
2 the question of unsealing? I think your argument is going to
3 be that the cat is out of the bag and the Supreme Court has
4 essentially approved of the letting of the cat out of the bag;
5 therefore, how can I say that it shouldn't be disclosed at
6 least those portions. That's your argument?

7 MR. LANGFORD: Yes, your Honor. And then I would
8 just point out a couple of things. One, I actually don't
9 necessarily know that it's relevant whether the Supreme Court
10 allowed this to happen. I think the argument is just that
11 because this is publicly available, there is no longer any
12 effect to a sealing order at least with respect to these
13 portions of the PSR.

14 THE COURT: Well, I mean, I don't agree with that.
15 If it's merely Mr. Lerner saying this is what is in the PSR,
16 that isn't inherent reliable or validity. The problem I'm
17 having is a little bit of let it go into the record as to what
18 the PSR says, which I think is subject to some dispute. And
19 that's why I think the more relevant issue is whether or not
20 you even get to reference these representations about what the
21 PSR says. This is clearly a public record. I get that,
22 assuming that this redacted copy was filed as is. You can
23 certainly represent that. But I'm concerned about creating a
24 record that gives the impression that this is a fact of what
25 the PSR says, when I don't have or don't have the ability

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1 right now to test that or review it.

2 Now, I don't know, and I'll hear from the Government
3 on whether there is harm in you saying, okay, a publicly filed
4 document with the Supreme Court the following representations
5 were made about what was in the presentence report. So that
6 information is out there in public, at least the
7 representations are.

8 MR. LANGFORD: Just one related point, was that in
9 the Government's own opposition filed by the Solicitor
10 General's Office --

11 THE COURT: That's the next document you handed me,
12 "Redacted brief of the United States in opposition."

13 MR. LANGFORD: If you turn to pages three and four.

14 THE COURT: Okay.

15 MR. LANGFORD: I'll just point out that starting
16 here.

17 THE COURT: Okay, right, okay. So that generically
18 refers to the fact that the PSR noted Mr. Doe's cooperation in
19 several places. It doesn't talk about the actual --

20 MR. LANGFORD: It does cite the specific paragraphs
21 of the PSR.

22 THE COURT: But nothing about the nature of the
23 cooperation in this part as least. Simply knowing that he did
24 cooperate and that was part of his PSR.

25 MR. LANGFORD: Yes, your Honor.

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1 THE COURT: You want to make the point the PSR
2 should be unsealed because it refers to his corporation.

3 MR. LANGFORD: At a minimum. I think anything
4 referred to in paragraph 130 of the PSR should be unsealed.
5 Our position is enough is disclosed in here, and I think in
6 conjunction with the public record that is otherwise
7 available, to suggest there should be a much broader
8 disclosure of the PSR in this case. And that is incumbent on
9 the Government to justify, I don't think it can justify
10 redacting these particular motions of the PSR. I think that
11 even if they can, they have to justify redaction. I don't
12 think they can be wholly withheld at this point.

13 THE COURT: My overall concern about this is that it
14 almost rewards the bad behavior of Mr. Roe by releasing
15 something he should not have released in the first place. So
16 then the argument goes in order to defend against that there
17 has to be a discussion about what is in it. Then that becomes
18 a boot-strap argument as to why it should be fully disclosed.
19 I'm concerned about this as a matter of policy.

20 MR. LERNER: Your Honor, there can't be any wrongful
21 disclosure. U.S. Supreme Court has granted the motion to
22 allow it to be disclosed. They've taken that away from the
23 Second Circuit and from your Honor.

24 In fact, before I submitted that proposed redacted
25 version, I e-mailed exchanges with the court staff at the U.S.

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1 Supreme Court where they authorized me in that forum.

2 THE COURT: I'm talking when the original disclosure
3 with the filing of the civil complaints, from which this all
4 comes or arises out of, that is my concern.

5 MR. LERNER: There has never been a finding that
6 Oberlander obtained it through wrongful means.

7 THE COURT: I do say that I think things speak for
8 itself. Unless Mr. Doe gave to him, it's hard to imagine what
9 correct purpose he had that document for. Or who might have
10 been entitled to that document and given it to him. Let's not
11 go down that road. I'm explaining at some level this strikes
12 me as being improper because I'm dealing with the reality that
13 there are some references to the contents of the PSR in these
14 publicly filed documents.

15 Where the Government does it, I think it's a little
16 bit different than where Mr. Lerner does it. I think this
17 illusion might be, is to allow the arguments to be made that
18 there are these representations in public court documents
19 about what is in the presentence report. Then whatever follow
20 up argument you want to make in that vein, I'm sure the
21 cat-is-out-of-the-bag argument. But I will consider that. I
22 can't really say it's improper to reference representations
23 made in publicly filed briefs. However, I think the
24 Government can certainly argue that these are merely
25 representations that I can take for what they are worth.

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1 And there is a more fundamental arm here that
2 troubles me, that is because they were released in this
3 fashion. Because the defense of why they should be, or
4 because the case for why they should be in still sealed
5 requires some public vetting of that issue. It almost creates
6 an improper reason for it to then be unsealed. Like I said,
7 it seems to reward the bad behavior in the first place.

8 MR. LERNER: Objection to bad behavior.

9 THE COURT: Understood.

10 MR. LERNER: I'll state pursuant to Watkins, the
11 Watkins case from Judge Raykoff I believe moved for the
12 unsealing of the PSR on the supplemental memorandum.

13 MR. LANGFORD: If I can address the policy concern
14 you've expressed. That argument did percolate through Judge
15 Cogan and Judge Glasser's orders. There are a couple of
16 responses. I think it's an issue that is not really before
17 the Court right now. The first would be that the same
18 argument could be made for the Pentagon papers, which is that,
19 you could have argued that allowing a newspaper to publish
20 information that was wrongly obtained, I believe that very
21 argument was made and Supreme Court rejected that.

22 I think further, whether or not obtaining the
23 documents in the first place was lawful, I don't think factors
24 into the constitutional closure standard. The issue is, is
25 this information public. Which is why I said earlier, that I

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1 believe that whether the Supreme Court condoned these filings
2 or not, may be a motivating factor in a decision one way or
3 the other if they are sitting on Westlaw and they have the
4 indicia of reliability as these I think do. I think there are
5 more arguments to be made about why they are reliable
6 representations. I don't think the constitution permits
7 courts to keep that information secret anymore. It doesn't
8 yield to policy incentives that might allow people to disclose
9 documents. I don't think there is a fix for that. I think
10 that there are criminal statutes on the books that allow for
11 the prosecution of --

12 THE COURT: I know this matter has been referred on
13 this issue by Judge Cogan, I understand that. I'm only
14 cutting you off because we need to move forward.

15 Let me hear from the Government on the proposal to
16 allow the Intervenor and other parties to make reference to
17 this publicly filed brief, including the Government's brief
18 petition by Mr. Lerner, then also the Government's response to
19 the extent that it at least makes representations about what
20 is in the presentence report.

21 MR. NORRIS: I'm struggling with this one, your
22 Honor. I'm conscious of the fact that there is a long history
23 of this case. I won't profess to remember all the details.
24 But I believe that these issues were brought to the Second
25 Circuit's attention prior to the 2014 briefing in connection

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1 with the prior unsealing process before Judge Glasser. And
2 ultimately the Second Circuit continued to affirm redactions
3 or sealing in connection with the PSR. That's one point. And
4 that post dates this.

5 And I have a memory that some aspect of what had
6 happened in the Supreme Court and what was in the public in
7 the Supreme Court briefing, may have been brought to the
8 Second Circuit's attention in connection with those. I'm not
9 certain of it. I'm also not certain what our response was, if
10 any, or how the Second Circuit handled it. That's why I'm
11 pausing.

12 There was both an injunction that was issued in the
13 dissemination with the PSR. As well as ultimately in 2014 a
14 summary order of the Second Circuit that affirmed Judge
15 Glasser's redactions and sealing among other things with
16 respect to references to the PSR.

17 THE COURT: The problem I have is that this is a
18 brief from May 2012. It makes references to the PSR. Clearly
19 neither the Second Circuit nor I have any authority -- or
20 Judge Cogan or Judge Glasser I should say -- have the
21 authority to preclude a party from referencing what is in the
22 public already, what has been filed.

23 Now, an entirely different issue is whether I find
24 that those references justify unsealing the PSR. But I don't
25 think allowing them to make reference to it is something that

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1 I can really preclude them from doing in a public hearing.
2 Why can't they reference it. There is no argument to be made
3 that somehow the reference for what is already in the public
4 could cause any greater harm. The weight of that, or the
5 effect or consequence of that, I agree with you, may still be
6 subject to much argument and debate. You can respond. But it
7 seems to me the mere existence of these disclosures or
8 representations, I should say, is something I can't prevent
9 them from saying on the regard.

10 MR. NORRIS: That might be right as a matter of
11 constitutional law. Because so much of this case has been
12 characterized as advertent and inadvertent disclosures that
13 forces everyone's hand with respect to the new reality, the
14 Government will probably be excised and not refer one way or
15 the other publicly to anything that is mentioned.

16 You may be right, if in the event that these are
17 public regardless of how it came to be, it may that the
18 constitutional applications allows folks to make reference to
19 them. We're not going to do that today in light of prior
20 rulings.

21 THE COURT: No one is pointing me to a decision by
22 the Supreme Court where they make reference to what is in the
23 presentence report.

24 MR. LANGFORD: No, your Honor, that doesn't exist.

25 THE COURT: I'm going to let you say what you want

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1 to about what has been represented as being in the public
2 domain already. You can certainly make your counter arguments
3 about how, A, I shouldn't consider them at all, they don't
4 justify unsealing, and there is merely representations to a
5 large extent by the party moving for unsealing, that you're
6 neither going to confirm or deny, I guess, the language,
7 except for obviously the reference in the Government's brief
8 but that can be fairly innocuous. It talks more about generic
9 statements about his cooperation, which I think everything
10 knows.

11 Let's proceed with you making your arguments. Stick
12 with whatever is in the unredacted portions of the petitions.

13 MR. NORRIS: I would note we may not make any
14 comments about it today.

15 THE COURT: That's fine. Proceed how you want. I'm
16 going to let them make their arguments.

17 (End of sidebar conference.)

18 (Continued on the next page.)
19
20
21
22
23
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25

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1 (In open court.)

2 MR. LANGFORD: On February 9, 2015, Presumptive
3 Attorney General Loretta Lynch submitted answers to questions.
4 And in response to a question from Senator Hash, let's see if
5 I can summarize the question for you. Senator hash says, "A
6 professor at the University of Utah College of Law testified
7 before the House Judiciary Committee, House Judiciary
8 Subcommittee, on the Constitution regarding implementation of
9 crime victims' rights statutes. These include mandatory
10 Victim Restitution Act and the Crime Victim Rights Act, both
11 of which I have helped enable. He, Professor Paul Castle,
12 suggested that your office had failed to follow these statutes
13 in a sealed case involving a racketeering defendant who had
14 cooperated with the Government. Specifically, he cited
15 documents appearing to show that your office failed to notify
16 the victims of the sentencing in that case and had arranged
17 for the racketeer to keep the money he had stolen from
18 victims."

19 Senator Hash asked Loretta Lynch to explain. She
20 says, "The defendant in question here" -- she says Felix Sater
21 -- "provided valuable and sensitive information to the
22 Government during the course of his corporation, which began
23 in or about December 1998. For more than ten years he worked
24 with prosecutors from my office, the United States Attorney's
25 Office for the Southern District of New York, and law

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1 enforcement agents from the Federal Bureau of Investigation,
2 and other law enforcement agents, providing information
3 crucial to national security and the conviction of over 20
4 individuals. Including those responsible for committing
5 massive financial fraud and members of La Cosa Nostra. For
6 that reason his case was initially sealed."

7 She goes on to talk a little about the sealing. But
8 the argument with respect to this testimony is that once
9 again, there is a very, very public record of a very
10 high-ranking Government official acknowledging the extent of
11 Mr. Doe's cooperation against members of La Cosa Nostra.

12 THE COURT: So your focusing on the LCN part of her
13 comment.

14 MR. LANGFORD: I'm sorry, the LCN?

15 THE COURT: La Cosa Nostra.

16 MR. LANGFORD: Yes. It also refers to national
17 security issues.

18 THE COURT: Which is very generic and vague. You
19 may proceed with your next argument.

20 MR. LANGFORD: What I would suggest I do is provide
21 your clerk with a copy of the brief. I'll give the page
22 number on those copies, it may be easier than the Westlaw. So
23 the set of documents that I'm about to refer to were filed
24 when Mr. Roe saw cert from the Supreme Court in this matter.
25 And the documents refer very specifically to the PSR and to

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1 the contents thereof. The documents represent what they claim
2 are the contents of the PSR.

3 THE COURT: Be specific, what Mr. Roe claimed was
4 contained in the PSR.

5 MR. LANGFORD: Both what Mr. Roe claimed in the PSR,
6 there is also a response from the Government.

7 THE COURT: You should specify whom you're
8 attributing each of those representations to.

9 MR. LANGFORD: Of course, your Honor. I want to
10 preface by saying there is something you can glean from the
11 metadata from the cites, both the Government and Doe and Roe,
12 are citing to the same portion of the Supreme Court Joint
13 Appendix. More importantly, neither contradicts what the
14 other says is incorporated in the PSR. And so I think both
15 strongly suggest that these are accurate representations of
16 the contents of the PSR. One would suspect that the Solicitor
17 General's office would challenge a blatant false
18 characterization.

19 THE COURT: I understand your argument.

20 MR. LANGFORD: So in Roe's own petition for cert, on
21 page seven -- we're going to engage in a long reading
22 exercise, I hope I'm not wasting anyone's time by doing this.
23 I can submit this afterwards, if you prefer. I'd like to be
24 on the public record, but I also don't want to waste
25 everyone's time.

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1 THE COURT: I would just read it very slowly.

2 MR. LANGFORD: Yes, your Honor. So on page seven of
3 Roe's cert petition. Roe asserts that Doe's 2004 presentence
4 report or PSR noted DOJ hadn't given the victim list, JA514,
5 required by the MVRA, so probation can contact victims about
6 restitution. Across the break, on pages seven and eight, Roe
7 goes on to assert the PSR also shows the probation officer,
8 though charged with warning employers and others of the
9 recidivism risk, knew Doe had been working since 2002 as a
10 partner at that real estate development firm, yet agreed not
11 to communicate with the firm, thus allowing Doe's prosecution
12 to remain hidden from the firm and his partners, JA515.

13 Continuing on page eight, the officer also stated in
14 the PSR that Doe self-reported no salary from -- this is
15 redacted -- but he, the officer, wouldn't verify it, JA537 to
16 38. As that might alert the firm to Doe's secret case JA537.

17 Continuing on page eight, the probation officer
18 concluded Doe had a negative net worth of -- it's redacted --
19 JA540, yet with no income still managed to live and in -- this
20 is redacted -- per month house, JA534.

21 Continuing on page eight, the officer expressly
22 noted that he did not ask what happened to the millions of
23 dollars of crime proceeds Doe had admitted receiving, JA541.

24 On page ten, Roe asserts the documents, meaning the
25 documents at issue in the Second Circuit's litigation, were a

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1 criminal complaint, JA590; information, JA588; proffer, JA466;
2 and cooperation agreement, JA472 to 480, all from 1998, and a
3 PSR from 2004, JA496 to 544. All from Doe's secret case,
4 98-CR-1101 EDNY, identifying Doe by his true name confirming
5 Doe had pled guilty to racketeering and had been scheduled for
6 sentencing in 2004.

7 Skipping ahead to page 23, Roe argues even without
8 the submissions the judiciary would have to know because
9 during that entire time respondent was under a cooperation
10 agreement and a probation office knew what he was doing,
11 JA515.

12 I realize I cut off the sentence that gives that
13 some context. The sentence before that refers to Doe's
14 ongoing fraud while he was cooperating as a witness, the point
15 that Mr. Roe is making is that the probation office would have
16 known fraud.

17 On pages 23 and 24 Roe argues, the Court's below
18 must know he has been emboldened to continue his -- if for no
19 other reason than his probation officer acknowledged in the
20 2004 PSR that Doe's racketeering conviction was being hidden
21 from the firm and his partners including petitioner's clients,
22 JA515.

23 In the Government's response, I believe this is
24 their response on the merits, the Westlaw cite is 2013 Westlaw
25 648684, on pages three to four. The Government acknowledges

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1 that the District Court had previously scheduled Doe's
2 sentencing for September 2004, docket entry number 15,
3 July 22, 2004. In advance of sentencing, a court-appointed
4 probation officer prepared a presentence investigation report,
5 CA8496 to 544 (2004 presentence report). The very same that
6 Mr. Roe is citing to you in his briefs, see 18 U.S.C. 3602.
7 I'm going to skip the rest of this cite.

8 The Government goes on to say, that report noted
9 Doe's cooperation agreement with law enforcement multiple
10 times and relied on Doe's assistance and noting the District
11 Court's authority to impose a more lenient sentence than would
12 otherwise be required, CA at 8532 paragraph 130, 543, to 544,
13 paragraphs 180 and 185 to 186.

14 In light of Doe's ongoing cooperation, however, the
15 sentencing was adjourned to a later date, as occurred multiple
16 times during the proceedings. See for example petitioner's
17 appendix 106A to 107A. I'm going to skip through.

18 A probation officer prepared a revised presentencing
19 report in connection with Doe's sentencing in 2009, cite is to
20 presentence investigative report September 15, 2009. In
21 petitioner's reply brief -- I apologize I was unable to locate
22 on Westlaw, which is why I don't have quotes from that brief.
23 If I find them, I'll be sure to submit them to the Court. But
24 the Westlaw cite is 2013 Westlaw 836953. Roe argues on page
25 one, the documents at issue, those documents included a

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1 presentence report, PSR, from the 1998 case, which revealed
2 that Doe is hiding his previous conviction from his partners
3 in the new firm (an obvious material omission). On page nine,
4 Roe argues the 49 page PSR contains only a single footnote
5 explaining restrictions on redisclosure that apply to the
6 Bureau of Prisons, JA497.

7 Page 11, Roe argues, the 49-page PSR contains
8 exactly three references to Doe's cooperation agreement and
9 provides no details about the nature or extent of Doe's
10 cooperation, JA532, 543 to 44.

11 Finally, just one more quote, in the petitioner for
12 rehearing, and the Westlaw cite is 2013 Westlaw 316-6392, Roe
13 argues on page five, the District Court's sole reason for
14 enjoining disclosure of the PSR was that it mentioned the fact
15 of Doe's cooperation with the Government, see Petition
16 Appendix 64A, but the 49-page PSR contains only three generic
17 references to Doe's cooperation agreement and provides no
18 information about the nature or extent of Doe's cooperation,
19 JA532, 543, 244.

20 THE COURT: Before you continue with your argument
21 let me ask you a couple of questions. First, the references
22 to JA is to the Joint Appendix that was filed by the parties
23 before the Supreme Court, correct?

24 MR. LANGFORD: Yes, your Honor.

25 THE COURT: Do you know if any portion of that

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1 appendix was sealed; namely, the presentence report itself?

2 MR. LANGFORD: I do not know the answer to that,
3 your Honor.

4 THE COURT: That is a typical way that they proceed
5 in the Circuit, you know.

6 MR. LANGFORD: Yes, your Honor.

7 THE COURT: You don't know whether or not they
8 sealed the actual presentence report at the Supreme Court
9 level?

10 MR. LANGFORD: I do not know. I believe initially
11 the Joint Appendix was submitted under seal. I don't know
12 that any portion of the Joint Appendix was redacted or
13 resubmitted. I don't believe that a redacted version is
14 available on Westlaw.

15 THE COURT: You know I do want you to submit a
16 letter later -- never mind, we'll confirm it on the record
17 ourselves. Because my guess is that they sealed the Joint
18 Appendix, then only allowed out certain information under this
19 redaction protocol that was followed, including the documents
20 that you cited from which were only released after they were
21 redacted, correct?

22 MR. LANGFORD: Correct, your Honor.

23 THE COURT: The other question, the Supreme Court
24 ultimately denied cert after reading the petitions you
25 mentioned.

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1 MR. LANGFORD: Correct.

2 THE COURT: Rehearing by Mr. Roe and redened.

3 MR. LANGFORD: Correct.

4 THE COURT: And then the Second Circuit before that,
5 and the decision that Mr. Roe was appealing to the Circuit, to
6 the Supreme Court, confirmed the non-disclosure of the
7 presentence report as held by Judge Glasser, correct, or Judge
8 Cogan.

9 MR. LANGFORD: When you say the non-disclosure?

10 THE COURT: Meaning the request to unseal the
11 presentence report was the subject of the proceedings below
12 before Judge Glasser, correct?

13 MR. LANGFORD: Correct.

14 THE COURT: Judge Glasser resealed the document
15 after it was filed by Mr. Roe as part of his civil case,
16 correct?

17 MR. LANGFORD: Correct.

18 THE COURT: Then Judge Cogan decided the issue of
19 content based on the acts of Mr. Roe, correct?

20 MR. LANGFORD: Correct, your Honor.

21 THE COURT: He also ruled that the PSR should not be
22 disclosed; is that correct?

23 MR. LANGFORD: Correct.

24 THE COURT: All of those decisions were affirmed by
25 the Second Circuit?

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1 MR. LANGFORD: Correct, your Honor.

2 THE COURT: Go ahead.

3 MR. LERNER: May I correct several points?

4 THE COURT: All right.

5 MR. LERNER: First of all, the issue of the Second
6 Circuit on the 10-2905 was not the unsealing of the PSR.
7 Judge Glasser on July 10, I believe -- July 20, 2010, stated
8 that he's issuing a permanent injunction as to the PSR, not
9 because of any wrongful conduct by Mr. Oberlander but because
10 the PSR regime itself. He held that PSRs are a special kind
11 of document that are subject to special rules.

12 THE COURT: Greater protections from unsealing.

13 MR. LERNER: And in a sense he held that they are of
14 a higher order of protection than the Pentagon papers. That
15 issue was taken up to the Second Circuit. They did affirm the
16 non-dissemination of the PSR. But the issue there was not the
17 unsealing of the PSR, because there was no need to unseal it,
18 it was never a court-sealed document.

19 THE COURT: I'm not sure what that means exactly.
20 They are never disclosed in court proceedings.

21 MR. LERNER: But they are not docketed. They are
22 not sealed. They fall under a different regime.

23 THE COURT: They are not disseminated to the public.

24 MR. LERNER: But if they happen to come into the
25 hands of a member of the public, then it was argued that he

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1 has a right to disseminate it, as a member of the public has a
2 right to disseminate the Pentagon papers. I'm not rearguing,
3 I'm clarifying what was at issue.

4 THE COURT: I want to clarify the issue too. I want
5 to make clear to all the parties, this is partly what we
6 talked about at the sidebar, was that I allowed Mr. Langford
7 to make arguments and put on the record what is already in the
8 public domain via these briefs filed with the Supreme Court.
9 But those are representations by both parties as to what is
10 contained in the PSR. There is no, as I understand from
11 Mr. Langford, a Supreme Court decision specifically stating
12 what is in the presentence report.

13 So I want the record to be balanced that ultimately
14 notwithstanding these arguments and representations that were
15 made in the briefs by Mr. Lerner at the Supreme Court, and the
16 responses by the Government, the Supreme Court ultimately
17 didn't grant cert which allowed to stand the Second Circuit's
18 decisions on two different occasions in essence affirming the
19 continued non-disclosure, non-dissemination of the presentence
20 report at issue.

21 I want the record to be clear. And for no one in
22 the public leaving that somehow those recited representations
23 are fact or that they were proven or endorsed as fact by the
24 Supreme Court itself, notwithstanding the submissions of the
25 arguments to them.

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1 MR. LERNER: However, I will add as I stated at
2 sidebar, that under the Supreme Court rules, if a fact is set
3 forth in the petitioner for certiorari and it's not rebutted,
4 it is deemed true. I know there are new facts that have come
5 to light since 2010 and 2011 and 2012 warranting now the
6 unsealing of the PSR. Those facts are well-known in the
7 public. A fellow named Donald Trump is now the President of
8 the United States and had a business associate who we've been
9 calling here John Doe, who is a convicted RICO fraudster. And
10 the public needs to know the length of their relationship, the
11 nature of their relationship, and what kind of person John Doe
12 is. The PSR speaks to that quite clearly.

13 THE COURT: Mr. Langford, it was your -- hang on one
14 second.

15 I want to ask you one question, Mr. Lerner. You
16 cited as one of the reasons there should be disclosure the PSR
17 or maybe all of the documents is that the Government violated
18 the Crime Victims Rights Act. But the violation of that Act,
19 is a remedy for that requiring them to disclose documents as
20 to which there may be a compelling Governmental interest to
21 keep secret? I'm seeing a bit of a mismatch here. I
22 understand that part of your claim throughout has been that
23 the Government didn't fulfill its obligations under the Crime
24 Victims Right Act, as was a question posed to Presumptive
25 Attorney General Lynch, why is the unsealing the remedy?

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1 Where did it say in the law that that's the proper remedy?

2 MR. LERNER: It says it in the First Amendment as
3 interpreted by the Supreme Court and every other court that
4 looked at the issue. The remedy for Governmental misconduct
5 is the bright light of sunlight, the disinfectant of sunlight.

6 THE COURT: What you want disclosed is the
7 Government failing to advise alleged crime victims of
8 hearings, so the sunlight has been taxed on that, that is part
9 of the public record. There is, in theory, no notice that was
10 filed by the Government or certainly I guess you could voir
11 them to find that out. I'm not sure how revealing documents
12 that various courts, including Judge Glasser then Judge Cogan,
13 have decided should be sealed is the remedy for the victim's
14 rights not being observed. That's where I'm finding the
15 disconnect.

16 MR. LERNER: Let me quote from Loretta Lynch during
17 her --

18 THE COURT: Wait, I have to finish another thought.

19 It's not as if them coming to the proceeding in
20 which none of those records were disclosed either would solve
21 the alleged injury to them by not getting notice of the
22 proceeding.

23 MR. LERNER: Ms. Lynch, in terms of restitution,
24 "There has been speculation that my office pursues restitution
25 from cooperating defendants differently than it does from

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1 other defendants. It does not. With respect to Sater's case
2 the information in the record that concerns the issue of
3 restitution remains under seal. As a matter of practice,
4 however, the prosecutors in my office work diligently to
5 secure all restitution whether the defendant is convicted in
6 their cases, cooperated with the Government, or not."

7 I submit that when this case is totally unsealed it
8 will prove that was false. That the EDNY does not work
9 diligently to protect crime victims; that cooperators are
10 given specific deals; that victims of cooperators are not
11 informed of their CVRA and MVRA rights. That makes the
12 unsealing of paramount importance. This means that the
13 Eastern District has in a sense ratified the misconduct of the
14 prosecutors' office and allowed them to give special deals to
15 cooperators allowing them to keep the money they've stolen in
16 exchange for their cooperation, which I submit is maybe
17 reasonably construed according to Caperton standards of
18 reasonableness.

19 THE COURT: Let me ask you this, though, wasn't that
20 issue decided by the Second Circuit in the Supreme Court, the
21 same exact argument you've been making, which is that this
22 information should be disclosed to remedy the failure of the
23 Government? That was exactly, I think, the argument that was
24 made to the Circuit. Then you tried to get the Supreme Court
25 to decide. What is different? Why should I go against what

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1 has already been rejected by the Second Circuit and the
2 Supreme Court -- I or the Second Circuit, again I should say.

3 MR. LERNER: Because of what Ms. Lynch testified to
4 in front of the Committee, Senate Committee, what I just read
5 to your Honor. She said that this office, the EDNY office,
6 does protect cooperators. And unsealing this record -- I'm
7 sorry. She testified that the EDNY does protect crime
8 victims, does afford them all the rights under CVRA and MVRA.
9 Unsealing this record will show that that is false.

10 In other words, I submit that unsealing this docket
11 in its entirety will show judicial misconduct, prosecutorial
12 misconduct, and misrepresentations by Ms. Lynch when she
13 testified before the Senate Committee.

14 THE COURT: All right. Anything else to say on
15 that?

16 MR. LERNER: I ask that the information in the
17 record that concerns the issue of restitution be unsealed.
18 She said that it remains unsealed. I submit that there is no
19 such information. And that fact should be brought to light,
20 to the public light.

21 THE COURT: Okay. Mr. Langford.

22 MR. LANGFORD: So in one way I agree with Mr. Lerner
23 that things have changed since the Supreme Court denied cert,
24 most importantly the transcript of the Second Circuit's
25 February 14, 2011 hearing is now publicly available. Loretta

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1 Lynch's testimony was given after the Supreme Court denies her
2 and as a principal. I think it's important to step back for a
3 second. In this respect I think we differ somewhat from
4 Mr. Lerner's arguments. It is not part of the First Amendment
5 right of access test. As part of the First Amendment right
6 access test, the Court doesn't assess the utility of a
7 particular document to shed light on a particular proceeding.
8 Instead there is a categorical determination on the front end
9 of the test.

10 If there is a history of access and logic of access.
11 Under Preston two types of documents, like letters, briefs, to
12 proceedings like oral arguments, to pretrial hearing, voir
13 dire transcripts, et cetera. Then the right extends to that
14 category of records. Then it becomes the Government's burden
15 to demonstrate that for some particular reason and some
16 particular case, on a case by case basis, the right is
17 overcome.

18 THE COURT: You agree there is no history when it
19 comes to presentence report, quite the contrary, right?

20 MR. LANGFORD: Right, your Honor, absolutely. But
21 there is a very important qualification there. This is where
22 I would submit that Judge Cogan, I believe maybe it was Judge
23 Glasser, went off a little bit in adopting the Charmer
24 standard.

25 What Charmer deals with is a scenario in which, the

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1 specific issue before the Second Circuit was whether the court
2 should disclose a PSR at the outset, in the context of a
3 criminal prosecution. It didn't deal with a case like this
4 where a PSR becomes subject to access litigation, for
5 instance, in which the PSR is a prime exhibit. That, if you
6 accept the position, I think this Court has to, that the right
7 of access extends to the proceeding about unsealing
8 themselves. Then it follows that if the unsealing proceeding
9 is about a PSR, that is made part of the court record, the PSR
10 becomes subject to the right of access.

11 THE COURT: For what purpose, for purposes of
12 arguing for unsealing?

13 MR. LANGFORD: It becomes part of, it becomes
14 subject to the right because there is a history of access to
15 documents that form the basis of a court's decision, documents
16 that influence a court's determination of an issue. If the
17 issue happens to be about unsealing, to sort of
18 meta-proceeding, but it certainly is a judicial document.

19 THE COURT: So therefore you don't apply Charmer.

20 MR. LANGFORD: You wouldn't apply Charmer. It's not
21 about release in the first instance. There might be another
22 scenario that a PSR has been let out of the bag. Whether you
23 can stop a reporter from publishing it, clearly would be
24 subject to the Pentagon papers, to the jurisprudence
25 generally, that's a different issue.

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1 Charmer does not deal with the right of access
2 either. Charmer deals with the specific scenario in which the
3 Arizona Attorney General acquired a PSR from I believe it was
4 Eastern District of New York court, I don't remember
5 specifically, and wanted to use the document and sought
6 clarification. The issue went up to the Second Circuit. When
7 there is a request from someone like the Arizona Attorney
8 General to obtain a PSR for use in a criminal prosecution,
9 what is the standard for disclosure.

10 That's very different than when the PSR becomes a
11 prime exhibit in another judicial proceeding like we have
12 here.

13 THE COURT: I'm not sure I entirely agree with you,
14 but I understand what you're arguing. I think the potential
15 danger of your argument is simply because someone requests to
16 unseal something it all of a sudden looses or, here the PSR,
17 looses its of historical protection. I think you have to go
18 back to the standard of is this something that historically
19 has been subject to disclosure or dissemination to the public.
20 This is fundamentally a document that is not.

21 MR. LANGFORD: In the context a normal criminal
22 investigation, you're correct. Just as a judge's bench memos
23 are not subject to right of access, they are not judicial
24 record. The typical PSR is an internal court document, the
25 probation office is an arm of the court. It's like a bench

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1 memo in that context.

2 But when the PSR is disclosed for one reason or
3 another, and particularly where it concerns information of
4 public significance, I would say particularly, particularly
5 where it contains information of the highest public
6 significance potentially, there is no difference between a PSR
7 and any other exhibit at the core of a judicial proceeding,
8 like an exhibit to a summary judgment, those are subject to
9 the right of access. The PSR is playing a fundamentally
10 different role in this litigation than it does in your normal
11 criminal prosecution.

12 THE COURT: But certainly the preliminary
13 indications of disclosure are no different if it's criminal or
14 civil. In other words, you may endanger the safety of
15 individuals. You may disclose, as has been alleged here,
16 potentially ongoing investigation. And you certainly at a
17 minimum are going to undermine without knowing what is the
18 Government's ability to get individuals to cooperate if
19 something as simple as someone requesting to unseal a PSR
20 could sort of remove any cloak of protection that it had.

21 Go ahead.

22 MR. LANGFORD: So I think the problem is, your Honor
23 is conflating the motivations behind protecting PSRs in two
24 different contexts. Those are the same as you say, same sorts
25 of privacy at stake.

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1 THE COURT: I was going to say motivations. But the
2 consequences, aren't the consequences the same?

3 MR. LANGFORD: I think they would be if you don't
4 have a very full-some public record of what this individual
5 has been prosecuted for, of what their criminal history was,
6 the Presumptive Attorney General talking about the crimes,
7 talking about the witness' role. If you didn't have
8 references to the very PSR in a public Supreme Court briefing
9 it's a very different scenario. I think you certainly could
10 have a case, and you probably do with respect to certain
11 aspects of this PSR, that the right of access is overcome.
12 But the point is in the Charmer instance if I intervene in a
13 normal criminal case, I say I want to see the PSR, it gets
14 kicked on the first part of the right of access test. It's
15 not a judicial document. It's not filed with the court. It
16 is not typically part of the record. It's not what the
17 litigation is about. It's like a bench memo, so the right
18 doesn't attach there.

19 If on the other hand, say a very high-profile
20 individual were to be prosecuted and for whatever reason a PSR
21 makes it out, there is a lot of litigation over the
22 surrounding aspects of the PSR being leaked, that all of a
23 sudden becomes a judicial proceeding. There is briefing on
24 the PSR, about it's contents. If the PSR is submitted as an
25 exhibit it very becomes subject to the right of access.

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1 THE COURT: Okay. I understand your argument.

2 Did you want to say anything further, Mr. Langford,
3 Mr. Lerner is jumping up.

4 MR. LERNER: I'd like to point out, there is no
5 categorical rule that the PSR can't be made public. In fact,
6 Judge Raykoff in the Watkins case did order a PSR public in
7 furtherance of the ends of justice because the person who was
8 the subject of that PSR had made misrepresentations in
9 litigation, I believe also in the public, which was
10 contradicted by what was set forth in the PSR. So pursuant to
11 Watkins we would submit, and we'll brief the issue in a
12 supplemental memo, this PSR must be unsealed because of its
13 paramount importance now.

14 THE COURT: Thank you. By the way, I'm not inviting
15 any supplemental briefing. You've already submitted a brief
16 that I have. So I don't intend to ask for anything further.
17 If you want to make any other argument or cite any other
18 cases, now is the time to do it.

19 MR. LERNER: Well then, I'm citing the Watkins case
20 from Judge Raykoff in support of unsealing the PSR. Because
21 we submit that by allowing the regime of secrecy to continue
22 by the probation officer not doing his job, it facilitated
23 what we may be apparent to be fraud by President Trump in
24 financial institution fraud. I would speak to that further,
25 but I don't think this is the appropriate place.

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1 THE COURT: Thank you, Mr. Lerner. Mr. Langford?

2 MR. LANGFORD: I think I pretty much touched on
3 everything I would like to touch on. There is one logistical
4 issue, in that in the both the Government's chart identifying
5 their positions on sealing and Mr. Doe's chart there are a --

6 THE COURT: Mr. who?

7 MR. LANGFORD: Mr. Doe's chart. There are many
8 missing docket entries. The numbers even in the combined
9 chart that I've prepared to assist the Court, you'll see do
10 not actually run, there are gaps. I hope it doesn't mean we
11 need to come back but, I sort of think we might have to come
12 back if there are other documents that, and we know there are
13 other documents and other filings that are not on the public
14 docket. I think the case law in the Second Circuit could not
15 be clearer that the entirety of the docket sheet is subject to
16 the right of access. I think, it's very much the Government's
17 burden, and Mr. Doe's burden, to justify withholding that even
18 the docket itself, the entries. The Second Circuit Hartford
19 Courtant case.

20 THE COURT: Point to me a document that you say is
21 not on the Government's list. You're referencing the filing
22 that you made this morning, which we did unseal.

23 MR. LANGFORD: If you look down the left-hand column
24 of the Government's most recent chart the numbers are one,
25 two, four, five, seven, nine. I'm not good at math, but

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1 that's not the entirety set of docket entries. We're missing
2 three, six, eight. There is a host of docket entries missing
3 from the Second Circuit's publicly available record.

4 THE COURT: I think, though, my concern is that you
5 may be making a bit much about what turns out to be some
6 administrative filings that the Court did.

7 For example, three, even identified on your chart,
8 is the District Court order.

9 MR. LANGFORD: Sure.

10 THE COURT: And then four is a notice of appearance.
11 So these are documents that -- I don't know if the Government
12 has any opinion on -- and truthfully I'm aware that they had
13 to rely to some extent on documents that were provided to them
14 by the Circuit. I think we're all operating at a bit of a
15 disadvantage in that regard, since the entire docket -- the
16 documents themselves are not available through the public
17 docketing system. So the question I have for you is, is there
18 anything that you've identified that actually seems to be
19 something of substance as opposed to administrative filings?

20 MR. LANGFORD: There are a couple of things. If you
21 turn to page four of the table that I submitted, there is a
22 very big gap between docket entry 135 and 140, there are four
23 documents missing there. Before that there are 124 and 128.

24 THE COURT: More importantly seven between 128 and
25 135.

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1 MR. LANGFORD: That runs throughout this table.
2 What I believe is happening in the Second Circuit is the same
3 thing that is happening here, which is that there is a sealed
4 docket and that some those filings are matriculating to the
5 public docket. But I believe there is somewhere in the Second
6 Circuit a record that has all of these docket entries.

7 THE COURT: Let me turn to the Government. I don't
8 think the Government has any access to any sealed docket.

9 MR. NORRIS: No, we certainly don't. A couple of
10 comments on that. I know our redacted letter has been filed
11 from June 9. We reviewed the numbers in terms of what we've
12 been able to access and able to review for purposes of these
13 proceedings. There is no doubt we have don't have everything.
14 When we embarked on this process we reviewed our own files,
15 talked to the court, talked to the Second Circuit Clerk of
16 Court, tried to get what we could from the publicly available
17 Second Circuit. And everything we were able to pull and
18 everything we were able to find we reviewed for purposes of
19 these proceedings.

20 I agree with counsel, it does appear there are some
21 things we don't have. But we're not certain how to get access
22 to them at this point. Our understanding is the Second
23 Circuit Clerk of Court has provided everything it has to your
24 Honor. And I'm not aware --

25 THE COURT: Not exactly, but yes.

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1 MR. NORRIS: I'm not aware of where else we can look
2 to find any other documents at this point.

3 THE COURT: This is a bit of conundrum of no one's
4 making who is here. What I will endeavor to do, we have
5 access to I think the sealed docket sheet, we will make a
6 comparison to see what some of these missing entries are. If
7 necessary I may, if necessary, I'll take some action to advise
8 the parties if something further needs to be addressed by the
9 parties. That's probably the best way to put it. I had not
10 really considered these missing documents to be relevant.
11 Because as I said, I think many of them are not substantive
12 but merely administerial. I think sometimes things will be
13 numbered by a number, but the Court does it internally. It
14 has no bearing that the parties can or should address. So I
15 will make sure that we look at some of these missing entries
16 and do a comparison to figure out whether or not anything more
17 needs to be discussed by either side.

18 That will be part of the project when I make the
19 recommendation to the Second Circuit. And if something needs
20 to be briefed supplementally or further we'll let you know by
21 notice of some sort. But obviously, this is also something I
22 have to deal with the Clerk's Office in the Second Circuit as
23 well.

24 MR. LANGFORD: Your Honor, the only other point I'd
25 raise now is that for each of the documents that the

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1 Government and/or Doe have argued for redaction, they do not
2 identify whether they consider them to be judicial documents.
3 That determination is, again, made on a categorical basis.

4 If they intend to argue, for instance, that docket
5 entry 128, on page four of my table, which is a motion for
6 clarification of the February 14, 2011 order, that argument
7 should be made publicly and we should have an opportunity to
8 respond to that sort of argument.

9 THE COURT: Whether something is a judicial document
10 or not.

11 MR. LANGFORD: As a category of record.

12 THE COURT: Well, contrary-wise are there some
13 specific designations? Because you have the benefit of those
14 from the Government's unsealed or partially unsealed letter.
15 Are there any that you would contend should be deemed judicial
16 documents? The problem is, you don't you know what they are,
17 right?

18 MR. LANGFORD: I would say partially. Some of these
19 that they have argued are not -- for instance, docket entry
20 four, notice of appearance as substitute counsel. These are
21 admittedly ministerial filings, but I think that the Second
22 Circuit's Amodeo test is very clear that the only things that
23 are not judicial documents are things that have no relation to
24 the Article III function. And I think if you read that case
25 alongside Hartford Courant that talked about the utility of

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1 docket sheets. And Hartford Courant applies to the entirety
2 of the docket sheet.

3 The reason that there is a logical access to the
4 docket sheet, these sorts of filing ensure that the process is
5 unfolding normally. The sorts of documents that the Second
6 Circuit and other circuits in the country are being concerned
7 about pulling off of out of the judicial documents category
8 are things like bench memos or PSRs, in your ordinary criminal
9 case, or things like discovery disputes where they are filed
10 with the court for the sole purpose of showing that they are
11 irrelevant to whatever the dispute is about.

12 THE COURT: Let me ask you a question, this is a
13 more pragmatic response to what you're raising. First of all,
14 it's difficult for the Government to discuss at length in an
15 open proceeding, I think, why it may view some documents as
16 non-judicial or not judicial documents. Because the
17 Government would have to reveal what the documents are and
18 currently nobody, save maybe Mr. Roe, knows what those
19 documents are.

20 Now you've pointed to something that is listed on
21 the public docket number four in particular, as something
22 where it appears that the Government may have incorrectly
23 viewed that document as not the judicial document. However,
24 this is where I'm being pragmatic, again, the Government has
25 taken the view that that can be unsealed; that's their

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1 position. So I don't think there is any purpose in going
2 through necessarily all the documents because either the
3 Government isn't going to be able to explain why they took the
4 position, it's not a judicial document; or with number four,
5 they are not opposing the unsealing of that document.

6 So I'm not sure theoretically I can view the issue
7 differently. I'm not sure it's worth figuring out every
8 single document as to which the Government believes is
9 judicial or not, because the practical effect is almost nil
10 where they are saying we agree with unsealing.

11 MR. LANGFORD: I agree, your Honor. And I would not
12 want to go through that. I will just say that I don't think
13 it's appropriate, for instance, if the Government intends to
14 argue that sealed motions, that oppositions to motions, these
15 are substantive documents and also letters, if they intend to
16 argue that these should be redacted in part because whatever
17 is redacted is not subject to the right of access, I think we
18 should have a chance to respond to that.

19 THE COURT: I got it. Okay. Let Mr. Norris
20 respond.

21 MR. NORRIS: In our first version of the chart that
22 we included in the June 9 letter, we didn't include a column
23 as to whether a document is judicial or not. We did the
24 Court's order with second chart.

25 The Court is correct, nothing rides in our

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1 determination whether or not the documents that we said could
2 be unsealed, whether we viewed them as judicial or not. If we
3 incorrectly designated one as no where it should have been
4 yes, in some instances we're happy to have that corrected.
5 There is no specific document that --

6 THE COURT: You're relying on the presumption --

7 MR. NORRIS: We're relying on a presumption or
8 making any redactions or sealing decision based on the
9 conclusion that it's not a judicial document. It's just our
10 effort to assist the Court and answer the Court's question in
11 that regard.

12 MR. LANGFORD: One other category of record that
13 appears, if you take a look at page two of the table I
14 submitted, there is a docket entry number 26, listed in the
15 both the Government's and Doe's charts. They both consent to
16 unsealing, so it's not something that we need to worry about.
17 But we actually we don't know what that is, it's not on the
18 public docket. I guess I would just suggest that there may
19 will be substantive documents that don't exist on the docket.
20 There is related, on page nine, docket entry T34, it's a
21 little bit strange. It doesn't appear on the public record,
22 no one is opposing unsealing, the Government and Doe I think
23 will disagree whether it's a judicial document or not.

24 THE COURT: Understood. I think Mr. Norris' comment
25 that they did not take a position on sealing or unsealing

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1 based in large part or exclusively on its of determination
2 about whether a document is judicial or not. I gather your
3 further point is that there may be some lack of knowledge or
4 ignorance about what a document is based on this somewhat
5 haphazard filing that has been going on or filing practices
6 that have been employed at the Circuit level. And that's not
7 a criticism, mind you. But certainly because you've put us on
8 notice about these gaps, I will be sure to try to fill them in
9 because we're probably the only body entity who has
10 semi-perfect knowledge or the most-perfect knowledge of what
11 may be behind these missing entries.

12 If I think there is a real concern about a
13 substantive document that hasn't been disclosed to either
14 side, I will solicit additional briefing or argument as
15 necessary. Certainly after figuring out whether or not it's
16 something that I can do that with. Because I, too, am
17 operating under some limitations given the sealing that's
18 happened at the Circuit level. We'll try to sort that out.

19 Did you answer your question?

20 MR. LANGFORD: Yes, your Honor.

21 THE COURT: Mr. Lerner?

22 MR. LERNER: I think the concern has been expressed
23 by the Court, I want to make sure it's clear. That First
24 Amendment category analysis doesn't work. And that the Court
25 has to actually look at the content of the documents to see

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1 what is in them to determine whether they should be unsealed
2 or kept sealed.

3 THE COURT: Yes.

4 MR. LERNER: So for example, a document that might
5 have an innocuous title or may appear to be a scheduling
6 order, which may have no title it's not obvious that it's
7 important, but it may well have content that is significant
8 and the public needs to know.

9 THE COURT: I don't disagree with you on that. But
10 you realize to a large extent I think the Government has taken
11 the position that those should be unsealed.

12 MR. LERNER: I am just making my concerns known
13 about categorical analysis based on the title of the document.

14 THE COURT: Understood, understood.

15 Mr. Kaufman, you've been waiting patiently. Do you
16 want to make some additional statements?

17 MR. KAUFMAN: I'm going to take on -- I've been like
18 a dog with a bone on this -- I'm going to take on what I view
19 and what like to believe everyone could agree is a rather
20 simple issue, which is the openness of the motions themselves.
21 I do represent investigative journalists. I'm sure they're
22 not happy when they can't, literally, I advise them that they
23 could not necessarily safely reveal that this proceeding was
24 going on at the outset and based on the Second Circuit's
25 blanket sealing of even -- I like to tell friends, I won a

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1 motion. The Second Circuit granted my motion for leave to
2 file on an AP Brief, supporting unsealing, so long as it was
3 filed under seal. It gets a laugh, maybe they don't
4 understand.

5 We prepared and I don't know your Honor whether you
6 have received it yet, but we tried to send it up to chambers.
7 We served it on everybody. We have given hard copies, and
8 annotated version of our amended Amicus brief. No? It didn't
9 get up there in time.

10 THE COURT: Did you file it with the Circuit?

11 MR. KAUFMAN: Did not file it. I wanted you to have
12 it in advance. Everyone else has it. I served it last night.
13 I have not filed.

14 THE COURT: Neither here nor in the Circuit?

15 MR. KAUFMAN: Neither here nor in the Circuit. The
16 amended Amicus brief was granted leave to be filed. It's
17 these annotations that I prepared between last Thursday's
18 hearing and today.

19 THE COURT: Okay.

20 MR. KAUFMAN: The point I'm trying to drive home
21 with those additional annotations, is there is nothing in our
22 motion papers that is subject to sealing. The Government has
23 conceded that.

24 We now have added totally non-controversial
25 materials, really almost bibliographic. We've added links to

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1 the documents that we are trying to point out have been public
2 about Mr. Doe for a long time. And we now provide hard copies
3 in an organized fashion, should that be of assistance to the
4 Court.

5 When I was counseling one of my Amici on Friday
6 night who wanted to tweet to his 80,000 followers something
7 about this upcoming hearing, his initial draft of it -- even
8 tweets get vetted by lawyers -- he wanted to include John
9 Doe's name. I was still uncertain as to whether that would be
10 permissible. Notwithstanding all of the annotations and
11 citations to all of the evidence starting in 1998 that John
12 Doe has been identified in connection with this case and a lot
13 of other things. His identity is not unknown.

14 As I was about to advise my client, you should not
15 put the name in, in came Mr. Doe's attorney's redacted,
16 approved, unsealed position paper on this proceeding. And the
17 first sentence of which was, "I am the attorney for" -- may I
18 say it now?

19 THE COURT: You don't have to say it.

20 MR. KAUFMAN: The name of Mr. Doe.

21 THE COURT: The real name of Mr. Doe.

22 MR. KAUFMAN: The real name of Mr. Doe. I think his
23 briefs used to say "now known as" -- the name I won't say.
24 Now he starts with the name and says "formally known as Doe."

25 THE COURT: It's like Prince.

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1 MR. KAUFMAN: I said to my -- with trepidation -- I
2 said to my client, you may include the name in describing the
3 subject matter that of an open hearing. I commend your Honor,
4 we have managed to go two days totally open and the world
5 hasn't come to an end yet.

6 And so I want to renew, and if it can only be your
7 recommendation to the Second Circuit, I want to urge you to
8 recommend that all of the motion papers be unsealed so that we
9 have essentially a public proceeding involving some very
10 important issues, even if there may have to be some exparte
11 gathering in your Honor's chambers or whatever.

12 I guess that's what I have to say. It's all about
13 the motion papers, so that this is really an open proceeding.

14 THE COURT: All right. Thank you very much,
15 Mr. Kaufman.

16 Again, thank you for your patience.

17 THE COURT: I'll hear from the Government, to the
18 extend that you want to respond to any of the parties'
19 arguments. Perhaps I should have let you of integrate your
20 arguments into theirs, but I figured you could write down your
21 thoughts.

22 MR. NORRIS: Yes, thank you, your Honor.

23 I'm going to be pretty limited in my remarks today.
24 I'm going to try to confine what I got to say to the issues
25 specifically related to sealing and to the particular

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1 procedure that your Honor has been appointed to undertake. I
2 hope that doesn't construe my lack of response with respect to
3 an argument counsel may have made, an agreement of the
4 underlying facts, that any of that argument are correct.

5 After the Intervenors made their application to the
6 Second Circuit back in March and the referral was made or the
7 appointment was made of your Honor, we reviewed all the
8 documents we could get our hands on and considered the facts
9 that we knew and considered new facts that we came to learn
10 that perhaps we hadn't known at the last juncture that we had,
11 briefing, sealing issues. I think it was Judge Cogan that we
12 briefed those issues before in 2016. So we under took that
13 process.

14 And as we had done before when faced with an
15 unsealing application and conducting that internal review, we
16 found that the vast, vast majority of what exists can be
17 unsealed. And so here, the back-of-the-napkin-math here, I
18 think we are, our chart indicates that we believe 80 percent
19 of the documents that we've been able to review thus far and
20 been able to see can be unsealed. Ninety-three of 115. Only
21 two we're recommending and asking to be sealed in their
22 entirety.

23 One document we take no position on. And the rest
24 we're requesting redactions, and in some cases the redactions
25 are exceedingly few. Some the filings in this case have run

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1 100 to 200 pages. On some of those documents we're asking
2 words on two or three pages be redacted, that's it. That
3 characterizes our approach and our general results.

4 As we indicated in our redacted letter, that sets
5 the basis which we believe are applicable to our request to
6 seal or redact. We think that safety continues to be a basis,
7 as has been found by Judge Glasser, Judge Cogan, and the
8 Second Circuit panel in this case. We believe that with
9 respect to certain documents safety continues to be a
10 compelling interest to the Government and the defendant.

11 THE COURT: You make that argument even given the
12 passage of time.

13 MR. NORRIS: Yes, indeed. Having taken into account
14 passage of time and other facts, we still make the argument
15 that safety in some instances is still a factor that leads us
16 to conclude, and the Court concludes, sealing is appropriate.

17 THE COURT: Also taking into account the fact that
18 there had been sort of gradual greater and greater
19 acknowledgment of Mr. Doe's cooperation.

20 MR. NORRIS: Absolutely. The point I was trying to
21 make, we've taken into account the world as it exists in 2017,
22 as opposed to at any prior time. So we tried to incorporate
23 any new information to our attention in the analysis.

24 Safety, we believe integrity of investigations, is
25 still a basis to seal. We believe that portions of the PSR,

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1 to the extent those are referred to in whole or in part, or
2 arguments are based thereon, should be sealed. And we believe
3 other decisions of other Courts do continued to be respected.

4 Those are all the categories that was publically
5 identified following the 2013 proceedings before Judge Glasser
6 and the appeal to the Second Circuit. And those are the
7 categories of documents that Second Circuit affirmed were
8 appropriately taken into account by Judge Glasser.

9 So we think essentially looking at this as law of
10 the case, as taking into account certainly the facts as they
11 may have changed, we still think there are specific documents
12 for those particular bases are still relevant and sealing is
13 still appropriate.

14 With respect to particular documents and the
15 particular bases that we cite, that's the one place where we
16 believe we have to stop. We don't think we can meaningfully
17 discuss a particular bases as it related to a particular
18 document or pages in a document without instantly undermining
19 the interest we're trying to protect. Whether your Honor
20 ultimately agrees with us, in a closed forum, we hope we can
21 have that discussion. To the extent your Honor has any
22 questions, in a closed process, so that we can make the
23 arguments and your Honor can consider them before ruling
24 without jeopardizing underlying interests.

25 THE COURT: Is it fair to say that the Government

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1 has taken a categorical position with respect to anything
2 contained in the PSR, to the extent that it's actually
3 identified as being in the PSR? In other words, is the
4 Government's view that if there is a document that says here
5 is what was in the PSR, that you would take the position that
6 that shouldn't be unsealed, that reference?

7 MR. NORRIS: Yes. I believe that's the approach
8 we've taken, and that's been taken consistently in connection
9 with prior proceedings.

10 THE COURT: Okay.

11 MR. NORRIS: That's all I've got to say. Fully
12 recognizing there are other issues and other points made by
13 counsel, I'm happy to respond to any questions your Honor has.
14 That covers to my mind what was relevant to the particular
15 decisions your Honor has to make with respect to the documents
16 that should be sealed or redacted.

17 THE COURT: I gather to the extent I want to find
18 out more particulars about those documents or portions thereof
19 that the Government maintains should still be sealed, you're
20 requesting that the courtroom be closed?

21 MR. NORRIS: Yes, we are. In connection with that,
22 following your Honor's order that the Government be prepared
23 to move to close the courtroom at today's proceeding, we
24 obtained the approval to be able to do that. We filed public
25 notice that we had obtained that approval, and we're so

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1 prepared this morning. And we also filed under seal an
2 exparte exempt as to counsel for Doe, our application and
3 proposed order in connection therewith.

4 We also, I would just note, in connection with the
5 prior discussion about notice to the public, that I certainly
6 did notice that the calendar for this proceeding today,
7 indicated that an aspect of it will entertain potential motion
8 from the Government with regard to closure.

9 THE COURT: Thank you.

10 Mr. Wolf, would you like to be heard on behalf of
11 Mr. Doe?

12 MR. WOLF: Yes, your Honor. First of all, on behalf
13 of John Doe we join in the Government's position that's been
14 filed in this proceeding. One, we join in the application for
15 closure as well. Your Honor, directed that we be in a
16 position to so move, we join in that application.

17 THE COURT: Okay.

18 MR. WOLF: And as well I would like to point out a
19 few things. Your Honor, I'll point out what is in footnote
20 one in the Government's June 9 submission, which says, I'm
21 paraphrasing a little bit, that Mr. Doe has previously been
22 referred to by his true name by the Government and other
23 parties in publicly filed documents, including in the Second
24 Circuit and cites the proceeding.

25 THE COURT: No one need be skirmish about that

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1 anymore.

2 MR. WOLF: No. And the same as Richard Roe, there
3 is no question who that is and that's been public as well. As
4 well as is his, Mr. Lerner's criminal referral by Judge Cogan
5 twice for criminal investigation in connection with the orders
6 issued in this case, and that criminal investigation by the
7 Department of Justice is still pending as of today. That's
8 also been reported to the Second Circuit, I think as recently
9 as a few months ago, when we appeared for oral argument in
10 another proceeding with Richard Roe. In that case it's
11 Frederick Oberlander was the counsel for the appeal.

12 That said, your Honor just briefly, I would point
13 out additional statements that were made by former Attorney
14 General Loretta Lynch, which have been quoted so far in
15 various points. This will just be short and sweet but to the
16 point, and certainly in line of what Mr. Norris has said on
17 behalf of the Government and the history in this case an the
18 decisions, and the frankly, respectfully, the controlling
19 decisions in this case.

20 So Judge, Ms. Lynch then said, "In addition to Judge
21 Glasser's 2013 ruling, a three-judge panel of the Second
22 Circuit Court of Appeals twice rejected efforts to reconsider
23 the decision to keep certain materials sealed in this case.
24 The judges reviewing Judge Glasser's order concluded that
25 given the, quote, 'extent and gravity of Doe's cooperation,

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1 continued sealing of select materials was appropriate.' In a
2 separate instance the Court went out of its way to warn the
3 plaintiffs behind the lawsuit to cease any further, quote,
4 'frivolous motions or else risk Court-imposed sanctions.'
5 Finally, just last month the Supreme Court declined to hear
6 any further arguments from the parties behind this lawsuit."
7 That's the end. Another few statements made in her testimony
8 on February 9, 2015.

9 So it's now three times the Second Circuit, because
10 since February 9, 2015, Judge Cogan in a very comprehensive
11 proceeding in this courthouse, in fact in contempt proceedings
12 against Richard Lerner and Frederick Oberlander, which were
13 public, public courtroom, and those are the proceedings which
14 resulted in the two criminal referrals over several years by
15 Judge Cogan. Judge Cogan issued his decision, of course going
16 through and I must admit, your Honor, when I saw the initial
17 motion by Forbes Media in this case and other letters, while
18 it was to unseal the Second Circuit docket, I fully expected
19 it would be largely administerial in light of the fact that
20 Judge Cogan dealings with the parties, the Government, and
21 certainly John Doe, we had gone through painstakingly document
22 after document of what was left after Judge Glasser had done
23 the same with the Government and John Doe, and it went up to
24 the Second Circuit of course. I expected that the largely
25 what was on the Second Circuit docket, although it was sealed,

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1 was already ordered to be unsealed. And frankly affirmed by
2 the Second Circuit, and that which wasn't unsealed. And I'll
3 focus just on the PSR, to be more specific, that would remain
4 sealed. There would be no access to it, as per what Judge
5 Cogan issued in his decision, which was the latest in a number
6 of decisions. And again, affirmed just a few months ago by
7 the Second Circuit, affirming Judge Cogan.

8 Respectfully, and your Honor certainly recognizes, I
9 think the limitations or what the Circuit has directed your
10 Honor to do, and we have no doubt that you'll do it well and
11 thoroughly, like it has been done so far.

12 THE COURT: I appreciate the vote of confidence.

13 MR. WOLF: That has been ruled on over and over and
14 over again at the District Court level and at the Second
15 Circuit level. There is nothing that's been brought out in it
16 this record that changes any of that, nothing has been changed
17 legally or factually to affect that.

18 A little color though, is necessary in light of
19 Mr. Roe's position in this proceeding and promoting the First
20 Amendment and how important it is to disseminate this PSR.
21 I'll just go back to the lawsuit, and there was a lawsuit that
22 was filed in 2010 by counsel for a plaintiff that is -- let me
23 just be clear, none of the victims that, quote, have been
24 identified by Mr. Lerner today, that the victims have a right
25 to be here -- so in the lawsuit that they filed in 2010, which

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1 they filed in the Southern district with the PSR attached to
2 it, that precipitated all of the litigation and the contempt
3 litigation and the litigation of sealing and up through Judge
4 Glasser and Judge Cogan, allegations of contempt, the PSR
5 attached to that lawsuit not on behalf of the, quote/unquote,
6 victims that they are talking about today, but on behalf of an
7 employee of a company, Jody Chris was the employee. The
8 lawsuit -- this is the PSR that Judge Glasser, in the
9 proceeding before him, determined and facts determined, were
10 stolen. In fact, it was a stolen document from the server of
11 this company. And Judge Glasser certainly on the record
12 before him maybe statements to that effect, and made
13 statements of the fact that Richard Roe being involved with
14 that wrongdoing. And on October 18, 2010, in a letter to
15 Doe's counsel, Mr. Roe, who's here today on behalf of the
16 First Amendment, said, "My clients and I simply demand what
17 they are entitled to, one billion dimes." Later in a
18 footnote, this letter is public record, it's been filed in
19 proceedings in this courthouse it's been filed in the Southern
20 District, it's an available record from the Law Office of
21 Frederick Oberlander from October 18, 2010 to Brian Herman,
22 Esq., who then represented John Doe.

23 In this a footnote on the same page, Mr. Roe then
24 says, "At this time plaintiffs will very favorably consider
25 settling the entirety of all claims, known and unknown, for

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1 the actual damages for \$35 million."

2 Again, plaintiffs not being any of the victims that
3 Mr. Lerner said it's very important that they know about this.
4 Okay.

5 Then he goes on to say, "It's the least amount which
6 plaintiffs would be willing to accept for a quick settlement
7 that avoids the dissemination."

8 So then in possession of the PSR, the threat was pay
9 35 million or a billion dimes and no one will get this PSR,
10 public First Amendment or otherwise all we want is the money.

11 Then following it up, less than a month later, about
12 three weeks later, again in a letter that is publicly filed
13 from the law office --

14 MR. LERNER: -- to the issue of the First Amendment.

15 MR. WOLF: Can I not be interrupted?

16 THE COURT: Hang on both of you. I think to some
17 extent he's addressing the question of whether there is some
18 genuine interest on behalf of the victims who you claimed
19 Mr. Lerner were cheated out of restitution. I think he's
20 trying to suggest that actually isn't a basis, I guess, for
21 the disclosure.

22 Now, I will say this, Mr. Wolf, the motivations of
23 the parties is irrelevant to the question of whether or not
24 there is a First Amendment right to the public of this
25 information.

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1 MR. WOLF: I understand.

2 THE COURT: Let's wrap it up.

3 MR. WOLF: I will.

4 MR. LERNER: May I?

5 MR. WOLF: If I could just --

6 THE COURT: What do you want to say?

7 MR. LERNER: May I ask the Court if it's relevant;
8 and if not, please strike Mr. Wolf's comments. I submit since
9 1215 when the Magna Carta was written, allegations are of no
10 evidentiary value. And those criminal referrals have come to
11 nothing.

12 THE COURT: You needn't strike anything. I'm aware
13 of those referrals as part of history. I do agree with you
14 that they are not particularly relevant to the issue before
15 me, but they are a matter of public record they are part of
16 the hearing.

17 Mr. Wolf, please do focus on the legal issues that
18 have been raised.

19 MR. WOLF: I will. In that second letter
20 Mr. Oberlander says, "Always remember, if I can't settle this
21 in time now, you will have brought this about by your
22 decision. Taking the tactical nuclear device I filed in the
23 Southern District New York", referring to the PSR, "and
24 enhancing it beyond even what I could have, magnifying its
25 yield to that of a strategic, thermal, nuclear weapon by

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1 dragging in the Eastern District of New York."

2 THE COURT: That's enough.

3 Mr. Lerner, please have a seat.

4 MR. WOLF: The last thing I'll say on the point
5 that's been indicated is a basis for further disclosure of
6 what would otherwise be sealed in accordance with the
7 Government's position in this case. It's been alleged, in
8 fact they are in attachments, the alleged statements from Mr
9 Sater to the media, the NarcoNews and LA Times articles. Your
10 Honor could see and read those, I'm sure will read them.
11 There are no statements by Mr. Sater as to La Cosa Nostra or
12 anything at all in that regard. I point to that specifically,
13 it's a particular focus here.

14 The national security statements are the national
15 security statements as identified. Loretta Lynch also
16 referred to national security, but he has provided no detailed
17 information at any time.

18 THE COURT: But the La Cosa Nostra statement came
19 from the Government during oral argument in the Second
20 Circuit. I don't think there is any dispute that it's out
21 there in the public record in some fashion. I accept your
22 representation that Mr. Doe isn't the one who put it out there
23 necessarily.

24 MR. WOLF: My point is a little different. Not that
25 it's not out there, and so the record is clear, what it is is

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1 Mr. Doe has not added anything to what is already out there
2 that's been identified, generally or in any detail, or further
3 detail, which would be relevant today. He has not. There is
4 nothing from John Doe that is in addition to what your Honor
5 cited. Separate statements are being made about La Cosa
6 Nostra or anything that's been referred to, that's not true.
7 And that's not part of this record. There is no record of
8 that.

9 THE COURT: I think the argument, though, is the
10 fact that it's public and no harm, thank God, has befallen
11 him, under the argument that safety is a genuine concern if
12 it's published that he cooperated against the LCN or any other
13 organized crime family. I think that's one general point that
14 all of the parties who are moving for unsealing are making.
15 I'm not sure the Government necessarily disagreed with that.
16 Certainly the Government itself has acknowledged that he did
17 help with some investigation about LCN members or the families
18 in general.

19 So I think that's the central point, whether it came
20 from Mr. Sater or not, whether he was promoting any further
21 dissemination of that information, I think is beside the
22 point. I know I just said his name. I think at this point
23 either reference is fine. It is a matter of public record.

24 MR. WOLF: Your Honor, that said, to the extent that
25 anything further would be requested by the Court in that

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1 regard, I could in a closed proceeding or closed forum with
2 the Court address that a little more consistent with the
3 Government's position as has been set forth.

4 I'll point out one other thing with regard to the
5 Second Circuit transcript, that's referred to as the
6 February 14, 2011 transcript. There is no doubt that's been
7 public since last year. It became public because in the
8 contempt proceedings that were pending against Richard Lerner
9 and Frederick Oberlander before Judge Cogan, a motion had been
10 made because the criminal investigation by them, which we
11 consented to, to stay that contempt proceeding. Then it was
12 stayed.

13 At the same time, a 950-page document was filed by
14 Mr. Lerner, which then after it was stayed, also got stayed or
15 nothing went further with it. In that 950 pages, which I'll
16 submit wasn't carefully reviewed beyond perhaps the first
17 hundred or so, since it was not going to be before the Court,
18 was buried what was then the sealed Second Circuit transcript.

19 And ten days later, which it was then sealed, it was
20 unsealed pursuant to Judge Cogan's standing order if there is
21 no objection. It's public. There is no question about it. I
22 point that out, as your Honor noted, and Judge Cogan noted,
23 about the boot-strapping of Mr. Roe and Mr. Lerner in this
24 matter to put something out that's sealed, then it's in the
25 public domain, then saying it's public, nothing you can do

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1 about it. That's all.

2 THE COURT: I understand, thank you.

3 Mr. Langford?

4 MR. LANGFORD: A couple of points to the last point.
5 It's actually precisely what the Supreme Court held in many
6 different First Amendment contents. When something is out in
7 the public it cannot be, the genie cannot be put back in the
8 bottle, game is over.

9 Second, just a quick clarification, Mr. Doe referred
10 to purchasing skinner missiles in his statement to NarcoNews.
11 I believe there is a public record, I've not fully flushed out
12 here that links that to activities of the LCN. That I don't
13 have support before me, but I believe that's part of the
14 public record.

15 I want to make a quick point. I think the
16 Government and Doe may differ slightly in the way they
17 characterize what is going on here. I think the Government,
18 very admirably, slowly acknowledged that as more information
19 has been made public, the right can no longer overcome with
20 respect to particular filings. I think Doe has also made the
21 positions in the chart. But the idea that this is an
22 administerial proceeding that relies on the finding of two
23 District Judges, the Second Circuit or the Supreme Court in
24 the past I think fundamentally misconstrued the nature of
25 First Amendment rights broadly. And a lot of jurisprudence

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1 that talks about the idea that depriving people, including the
2 entire public, of a First Amendment right for a single day is
3 a constitutional violation and an ongoing one at that.

4 The Court's determination when it looks at these
5 documents needs to be based on concerns that are real and
6 present now, not concerns that have been present in the past
7 or speculative concerns about the future. And even if the
8 content the documents may still need to be sealed for one
9 reason or another, the Government is conceding right of access
10 attached to those documents. There may well come a day that
11 all of this stuff should be public, because there are no
12 longer any compelling interests in keeping it secret.

13 I would just impress upon, I'm sure your Honor
14 understands this well, is very much incumbent on the Court to
15 press the Government in any closed proceeding on the
16 legitimacy of the interest that it asserts.

17 THE COURT: I agree with you on that. Thank you,
18 Mr. Langford.

19 I actually have a couple of questions for you,
20 Mr. Lerner. One is a request, amongst the documents that I
21 have seen is the civil complaint that you filed on behalf of
22 Mr. Roe in the Southern District. The problem with it is,
23 even the copy that I have was redacted for purposes of filing
24 in the Southern District. I don't know what is underneath the
25 redactions that were made I think in connection with that

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1 case. So the only person, I imagine, who has that, I don't
2 think even the Government has that, would be you -- so I'd
3 ask.

4 MR. LERNER: Are you asking for 10-CV-3959, the
5 original complaint?

6 THE COURT: Yes, correct. So if you can provide it
7 under seal and exparte, chances are, though, I'll need to
8 share it with the Government to the extent that they need to
9 take a position on whether or not those original redactions
10 are ones that they think should remain.

11 Let me just say this, I recognize that I don't have
12 the authority to undue something that another Court has
13 necessarily done. However, the Second Circuit might decide
14 that some of those original redactions are no longer
15 necessary, and so I'm going to look at that issue. But if
16 you'll send that, again, by close of business tomorrow?

17 MR. LERNER: Sure.

18 THE COURT: Can you either provide it to chambers
19 and we'll take care of getting filed, or if you know how to
20 file exparte.

21 MR. LERNER: To the extent the PSR, I purged the PSR
22 from my computer. So I don't believe, although the PSR was,
23 portions were annexed to exhibits to the 3959 complaint, I
24 can't provide that obviously.

25 THE COURT: I'm just interested in the complaint

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1 itself that has redactions.

2 MR. LERNER: There are several other exhibits which
3 were not controversial.

4 THE COURT: I'm only asking about the actual
5 complaint which contains those redactions.

6 One more thing before we take a quick break. I do
7 have another question for you, Mr. Lerner. There is a
8 document that actually was filed based on a representation of
9 an under seal exparte making a representation of
10 attorney-client privilege on behalf of Mr. Roe. So the
11 question is whether or not you are moving to unseal even that
12 document?

13 MR. LERNER: I think the only one I have in mind,
14 there were statements as to which other individuals Mr. Roe
15 spoke with regarding the case.

16 THE COURT: Yes.

17 MR. LERNER: Let me consult.

18 THE COURT: Let's take a short break here for our
19 court reporter's sake. She's dutifully and laboriously
20 transcribing everything. So take a few minutes to talk about
21 that. Come back here in 15 minutes, so 4:25, we'll resume
22 then.

23 (Whereupon, a recess was taken at 4:10 p.m.)

24 THE COURT: Back on the record now. I think when we
25 broke, I'm trying to remember, Mr. Lerner, were you going to

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1 look at something else that was filed and make a comment?

2 MR. LERNER: If it is what I think it is, it's not
3 controversial. We'll not object. Just confirm that it is
4 what I think it is. So how do I go about doing that?

5 THE COURT: Let's do this, I'm prepared to make a
6 finding to closing the courtroom so I can probe the Government
7 and John Doe further, the requested continued sealing and
8 redactions. There is also an issue that I want to address
9 with Mr. Roe as well, including this issue that I've just
10 raised about the assertion of attorney-client privilege. So
11 I'll allow Mr. Roe to remain for the first part of the closed
12 proceedings, so it will be bifurcated in a sense.

13 But I do make the findings that the closure is
14 necessary to protect a compelling interest of the Government
15 and John Doe, and that there is a substantial probability of
16 prejudice or harm if I do not close the courtroom to ascertain
17 additional information that will support or that has been
18 offered to support the continued closure of certain
19 documents -- the continued sealing of certain documents or
20 portions thereof. I also found that there is no reasonable
21 alternatives to closing the proceedings, because I do need to
22 get the information directly from them. I don't feel that any
23 other alternative would adequately protect the interests of
24 the Government or John Doe.

25 I mentioned earlier some of the same interests when

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1 I found find factions in various filings was appropriate.
2 Mr. Norris alluded to some of them as well. Certainly the
3 safety of individuals with whom the Government has been
4 working or that have been implicated in someway in some of
5 these documents, as well as the Government's investigations,
6 as well as the interests in the Government in being able to
7 secure in the future cooperation. And lastly, although this
8 doesn't necessarily require closure, there is an interest in
9 protecting or abiding by other Court orders and the reasoning
10 behind some of those orders.

11 I also find that the restriction of closing the
12 courtroom for this limited purpose is very narrowly tailored.
13 In fact, I'll note, as Mr. Norris did, that the Government is
14 only seeking continued disclosure as to a very few number of
15 documents out of the entire universe, maybe 20 percent at
16 most. And even as to those documents, the Government sealing
17 request or continued sealing request is very, very limited, as
18 indicated to some extent by the chart that's been provided to
19 the parties.

20 I do find that this closure for this limited purpose
21 and as to these limited documents, portions of documents is
22 very narrowly tailored. Lastly that this restriction will
23 protect the threatened interests of the Government and John
24 Doe.

25 I find closure of the courtroom at this time is

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1 appropriate and sealing of the proceeding as to only
2 Mr. Lerner and Mr. Roe initially, along with the Government
3 and John Doe and their legal representations.

4 Then at some point I'll ask Mr. Roe and Lerner to
5 leave as well. All right. With that I must excuse everyone
6 else.

7 MR. LERNER: May I state an objection on the record?
8 That is, Mr. Norris has given oral argument about why there
9 should be closure but he presented no evidence. And --

10 THE COURT: Thank you. I should note for the record
11 that I have reviewed the originally filed exparte submissions
12 and the portions that were redacted, for the reasons I
13 mentioned earlier I think do provide a sufficient basis to
14 find both a compelling interest of the Government and John Doe
15 and the need for closure of the courtroom under the various
16 factors. Thank you for reminding me.

17 MR. LERNER: Let me express concern, that is, if
18 there is to be in camera argument or as to the risk to
19 Mr. Doe, I note that he's not here today. He's not taking the
20 stand about any perceived risks. We would certainly request
21 and assert the right to cross-examine him about his perceived
22 risks. Without him being here and testifying, I submit, that
23 there can't be any finding that he actually is at risk.

24 THE COURT: Let me say this, the reason I disagree
25 with you is that, as may seem obvious to me at least, in order

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1 for you to probe that issue you would have to know what the
2 information is that he thinks puts him at risk, which would
3 obviously defeat the whole purpose of trying to decide whether
4 unsealing is appropriate, because in effect that would be the
5 unsealing. So there is an inherent problem with what you
6 propose. But based on everything I've seen, it includes the
7 documents at issue, I think it's appropriate not to allow
8 other parties to participate in that and for me to make the
9 determination based on the representations and argument of the
10 Government and Doe, plus my review of the documents
11 themselves. Continue with your objection.

12 MR. LERNER: One further point, in December of last
13 year and then again in February, Judge Schofield in the
14 Southern District ruled in connection with the 3959 RICO case,
15 that anyone who knew that John Doe was concealing his
16 conviction at Bay Rock and facilitated it, is guilty of
17 racketeering conspiracy. She reiterated that in order of
18 February 2017; she reiterated that further in February 2017.

19 The PSR as Mr. Langford recited, says that the
20 probation officer facilitated Mr. Doe's concealment of his
21 conviction.

22 THE COURT: That's the representation by you and
23 your submission to the Supreme Court.

24 MR. LERNER: Yes. And your Honor is accepting
25 representations by the Government as being so, I would ask

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1 that the same courtesy be granted to me.

2 THE COURT: It's not so much that. What I'm trying
3 to do is prevent you from revealing actual information. It's
4 not that I don't trust your representations, I can verify
5 that. I'm not going to, and the Government hasn't confirmed,
6 that the representation is accurate because that document is
7 still sealed.

8 MR. LERNER: Well, even if there were Governmental
9 immunity, still that PSR, we submit, in light of Judge
10 Schofield's ruling implicates the Government in the
11 facilitation of John Doe's racketeering. Therefore, we
12 submit, that it must be unsealed in its entirety because it is
13 of profound importance, it is a document that reveals
14 Governmental misconduct of the highest order.

15 THE COURT: I understand your order. Thank you.
16 Mr. Langford.

17 MR. LANGFORD: I request that your the Court make a
18 transcript of the closed hearing and release a redacted
19 version. And that I would suggest that as a least restrictive
20 closure of access.

21 Secondly, is it your Honor's intent to reconvene
22 following the closed portion?

23 THE COURT: No, you're free to go. I will, as I
24 said before, take under advisement your request about
25 releasing a redacted version of the transcript. Which will

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1 depend on what is discussed during that closed proceeding and
2 whether or not I think it's possible to release any redacted
3 transcript that would be sensible or convey any information
4 after any appropriate redactions are made.

5 MR. LANGFORD: Thank you.

6 THE COURT: Mr. Wolf, did you want to say anything?

7 MR. WOLF: Briefly in response to what Mr. Lerner
8 just said, and the Southern District record will speak for
9 itself. But the description of two orders by Judge Schofield
10 and the way it was just described by Mr. Lerner, I'm not going
11 to repeat, is just false. Judge Schofield made no findings as
12 he just indicated on this record.

13 THE COURT: Okay.

14 MR. WOLF: Nor was the issue raised before.

15 THE COURT: All right. That's obviously something I
16 can verify.

17 So with that I'm going to have everyone else leave
18 the courtroom except for the Government, Mr. Doe, his lawyers,
19 and Mr. Lerner and Mr. Roe for now. Thank you everyone.

20 (Whereupon, the remaining proceeding was held
21 in a closed courtroom.)

22 * * * * *

23 I certify that the foregoing is a correct transcript from the
24 record of proceedings in the above-entitled matter.

25 Rivka Teich, CSR RPR RMR
Official Court Reporter

Rivka Teich CSR, RPR, RMR
Official Court Reporter